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Without Color of Law: The Losing *Race* Against Colorblindness in Michigan

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WITHOUT COLOR OF LAW:
THE LOSING RACE AGAINST COLORBLINDNESS
IN MICHIGAN

*Khaled Ali Beydoun**

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The author would like to express that he is available for contact regarding information and resources for future anti-affirmative action campaigns. He can be contacted directly at kbeydoun@gmail.com.

INTRODUCTION: AN UNEVEN RACE TOWARD JUSTICE

"The truth is, however, that the oppressed are not marginals," are not people living "outside" society. They have always been "inside"—inside the structure which made them "beings for others." The solution is not to "integrate" them into the structure of oppression, but to transform that structure so that they can become "beings of themselves."

—Paulo Freire,
"Pedagogy of the Oppressed"¹

During a presentation at Wayne State University in Detroit, a young African American student asked me, "Why did *they* get an Arab to do your job, does affirmative action even effect Arab Americans? Couldn't they find a black lawyer? *After all*, it is a Black issue." The young student's question reflected a common misconception, the same Manichean myth that helped to end affirmative action in California and Washington State, and ultimately Michigan. Affirmative action is considered by many as an exclusively Black/White issue. It was only my first week working as the Affirmative Action Coordinator for the ACLU of Michigan & the African American Policy Forum ("AAPF"),² yet this student's question foretold of the myriad personal and campaign-related challenges that lay ahead.

Roughly one-year after embarking on the struggle to safeguard affirmative action in Michigan, I find myself reflecting upon the campaign. Piecing together the scattered personal experiences with the notable events that transpired during the campaign was no easy task, particularly in light of the Michigan Civil Rights Initiative's ("MCRI") ultimate victory; which mandated the end of affirmative action in Michigan. As disappointing as the outcome was, writing about it is an extremely cathartic exercise. No redeeming observation could be had to eliminate defeat nor postpone the aftermath that lay ahead, but Michigan's loss of affirmative action will fail to eliminate the passion, unity and strides made by the committed collective that took on former University of California-Regent and American Civil Rights Initiative head, Ward Connerly and his initiative. Moreover, the politics of affirmative action over the past decade have intersected, quite intimately, with critical junctures of my own life;

1. PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED 74 (Myra Bergman Ramos trans., Continuum International Publishing Group 2000) (1970).

2. See African American Policy Forum, http://www.aapf.org/about_us.html (last visited Mar. 20, 2007) [hereinafter "AAPF"]. "Founded in 1996 as a media-monitoring think-tank and information clearinghouse, the African American Policy Forum works to bridge the gap between scholarly research and public discourse related to inequality, discrimination and injustice. The AAPF seeks to build bridges between academic, activist and policy-making sectors in order to advance a more inclusive and robust public discourse on the challenge of achieving equity within and across diverse communities."

both mobilizing my commitment toward its defense at large, and most recently in my home state.

Michigan faced this issue at a most inopportune moment. Economic downturn made advocacy around this issue especially complex. Ultimately, affirmative action was undermined more by conditions on the ground in Michigan than by Connerly's efforts. Together the pair proved a most formidable opponent. The triumvirate of entrenched racism, gender inequity and economic tumult³ provided a fertile soil for Connerly and the MCRI. One United Michigan's ("OUM") research and polling firm echoed that Michigan's "electorate is as downbeat as we have ever observed in our 20 years of research in the state . . . When asked how things are going in Michigan, participants used words such as 'uneasy,' 'sad,' 'depressed,' and 'discouraged'."⁴ After all, Michigan was strategically chosen as Connerly's next battleground-state for precisely these reasons.

Every issue-based political campaign is preceded, and later fueled, by a divisive intellectual and public debate. Extracting a political campaign from its larger context would be an incomplete way to talk about affirmative action in America today. This examination will bring in external factors, including ones that are not visible on the ground: from the elite-level interventions and policy analysts, to the political-economic climate and framing of the issues. The influence of outside intellectuals on the MCRI campaign is also of interest. Presenting scholarship and policy studies addressing affirmative action and its ramifications illustrates the intimate link between the production of knowledge and its deployment on the ground during affirmative action campaigns, such as the MCRI.

My position as an affirmative action advocate and activist will naturally color my presentation. This is, make no mistake, an analytical retrospective of the campaign squarely from that angle. Nevertheless, given the character of the forum in which this piece will be featured and its' intended objectives, subjectivity in this instance is required. The aim of this piece is twofold: first, to construct a historical account of the campaign against the MCRI that examines its various dimensions; and second, to provide an educational tool highlighting replicable successes and flagging critical missteps for forthcoming struggles. This will serve to guide

3. See Jennifer Granholm, "Affirmative Action Ban Would Hurt State's Future," *DETROIT FREE PRESS*, Mar. 9, 2006 available at <http://www.vanguardnewsnetwork.com/?p=19>. "It is possible the proponents of this effort to change our constitution chose Michigan as their next affirmative action battleground precisely because we are a state struggling to transform our economy in the wake of federal policies that have literally shipped our manufacturing jobs overseas by the tens of thousands."

4. Memorandum from Al Quinlan and Liz Gerloff, Greenberg Quinlan Rosner, to Trisha Stein (Feb. 3, 2006) (on file with author).

proponents of affirmative action in states where affirmative action abolitionists, such as Connerly, plan similar campaigns.⁵

I. THREE THE *WARD WAY*: AFFIRMATIVE ACTION FALLS IN MICHIGAN, JOINING CALIFORNIA & WASHINGTON

On November 7, 2006, Michigan voted to do away with affirmative action, joining California and Washington State, and thus becoming the third state to do so by state referendum. The MCRI⁶ passed by a 58% to 42% margin,⁷ and effectively overturned in Michigan the Supreme Court's proclamation in defense of affirmative action only three years earlier.⁸ Polling conducted only weeks before the election showed a much tighter race than the final sixteen-point margin. Nevertheless, the MCRI would be formally written into the Michigan Constitution⁹ adding the following amendment to its pages:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting; (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.¹⁰

5. The outcome in Michigan represented a boost for Connerly's colorblindness campaigns, thus resulting in a new momentum for extending his vision elsewhere. Recent reports have included Oregon, Nevada, Arizona, Utah, Missouri and/or South Dakota as potential sites for subsequent anti-affirmative action campaigns. Richard C. Paddock, *Affirmative Action Era is Over, Longtime Foe Says*, L.A. TIMES, Nov. 26, 2006, available at <http://www.latimes.com/news/local/la-me-connerly26nov26,1,259,1674.story> [hereinafter "Affirmative Action is Over"].

6. The MCRI highlighted "Civil Rights," in the center of its title, *a la* its precedents, the "California Civil Rights Initiative" and the "Washington Civil Rights Initiative." Both were successfully voted into law in California and Washington state respectively, in 1996 and 1998.

7. Suzette Hackney, *Affirmative Action Ban OK'd: Michigan 3rd State to Nix Preferential Treatment*, DETROIT FREE PRESS, Nov. 8, 2006 [hereinafter "Affirmative Action Ban OK'd"]. "With 73 percent of precincts reporting, 59%, or 1,491,457 people, voted yes on Proposal 2 and 41%, or 1,052,209 voters, opposed it."

8. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

9. Later in the piece, I will discuss how post-campaign efforts have been launched to delay, and legally challenge, the codification of the MCRI into the Michigan Constitution.

10. MCLS CONST. art. I, § 26 (2006).

Following his 1996 California blueprint—the “California Civil Rights Initiative” known widely as “Proposition 209” (hereinafter “Prop 209”)—Connerly and proponents of the MCRI used deceit and a lack of transparency as a means to collect the required number of signatures needed to certify the anti-affirmative action petition,¹¹ sealing its appearance on the November ballot.¹² In April 2006, I was invited to participate in the “Overturning 209 Symposium,” hosted by the University of California–Berkeley, Boalt School of Law.¹³ The field strategy employed by Connerly during the Prop 209 campaign was naturally a central discussion at the symposium, and I had the opportunity to listen to formal presentations and participate in informal discussions about that campaign’s anatomy. Returning to California furnished me with a more advanced understanding of Connerly, the practical underpinnings of an anti-affirmative action campaign, and strategy, which I infused into my work in Michigan when I returned. Like Prop 209, the MCRI’s petition language made no express mention of affirmative action. A May 2005 poll rendered a 76–18% margin in favor of the MCRI, reflecting staunch opposition to affirmative action, as well as a considerable degree of confusion over the MCRI’s vague language and misleading title.¹⁴

Armed with petition language that made no reference to “banning affirmative action,” the petitioners intentionally misrepresented the MCRI as a measure that “promoted civil rights” and “protected affirmative action,”¹⁵ recycling tactics and strategies used a decade earlier to fool California voters.¹⁶ The Michigan Board of Canvassers, the governmental

11. The MCRI collected 508,000 signatures, and Michigan law requires 317,757 signatures to be certified.

12. The MCRI was known as Proposal 06-02 (“06” indicating the year, and “02” its order on the ballot’s proposal roster, hereinafter “Proposal 2” or “MCRI,” its more commonly used title).

13. I addressed the Proposal 2/MCRI campaign as panelist on the “Uniting to Overturn 209” panel. See *Overturning 209: A Joint Symposium and Movement*, <http://overturning209.boalt.org/speakers.htm#Beydoun> (last visited Mar. 20, 2007).

14. Memorandum from Al Quinlan and Liz Gerloff, Greenberg Quinlan Rosner, to Trisha Stein (May 5, 2006) (on file with author) [hereinafter “Highlights of Survey Results”].

15. See Brief for ACLU of Michigan & Nat’l Bar Association et al. as *Amici Curiae* Supporting Respondents, *Michigan Civil Rights Initiative v. Board of State Canvassers*, No. 130342 (Mich. Feb. 26, 2006) [hereinafter “ACLU of Michigan Amicus Brief”]. “The Michigan Civil Rights Commission conducted hearings on January 11, 2006 in Detroit, and on February 8, 2006 in Flint and later in Grand Rapids, where numerous citizens provided live testimony and sworn affidavits that provided details of their allegations that petition circulators misled them about the nature and purpose of the petitions.”

16. Both the petition and ballot language in California, and Washington in 1998, made no explicit reference to “banning affirmative action” in their respective texts. The so-called “California Civil Rights Initiative” reads as follows (sections a–c): “(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public

body responsible for authorizing petitions, initially opposed certification citing the prevalence of fraud during the critical signature gathering process.¹⁷ Subsequently, the board compelled a revision of the language to expressly write in the phrase “ban on affirmative action,” to make it more transparent (and to lessen its ability to mislead prospective voters):¹⁸

[A] proposal to amend the state constitution to *ban affirmative action programs* that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes.¹⁹

The revised language proved to be a victory for OUM and affirmative action backers at large, and in part defanged the ballot’s capacity to confuse or defraud supporters of affirmative action.²⁰ However, much of the damage had already been done, and the misleading title of the MCRI would not be changed,²¹ nor would the petition signatures be void.²²

employment, public education, or public contracting; (b) This section shall apply only to action taken after the section’s effective date; (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.” Proposal 209 passed by a 54% to 46% margin on November 5th, 1996. The Text of CCRI, <http://www.publicaffairsweb.com/ccri/text.htm> (last visited Mar. 20, 2007). The “Washington Civil Rights Initiative” (hereinafter “I-200”) passed on November 3rd, 1998, with 64% voting in its favor, and 25% and 11% opposed and undecided, respectively. Washington State Initiative 200 Ends Racial Quotas, <http://www.adversity.net/i200.htm> (last visited Jan. 29, 2007).

17. See Tim Martin, *Elections Panel Approved Affirmative Action Proposal*, THE DETROIT NEWS, Jan. 21, 2006, available at <http://aad.english.ucsb.edu/docs/01-20-06martin.htm>.

18. *Id.*

19. Scott E. Page and Elizabeth Suhey, A Decision Making Guide to the Michigan Civil Rights Initiative, http://www.cscs.umich.edu/~spage/diversity_files/MCRI.pdf. “The proposed amendment would: Ban public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and school districts; Prohibit public institutions from discriminating against groups or individuals due to their gender, ethnicity, race, color or national origin.”

20. See generally Plain Language for the Ballot, THE GRAND RAPIDS PRESS, Jan. 30, 2006, available at http://www.oneunitedmichigan.org/mediaclips/GRP_013006.PDF.

21. See ACLU of Michigan Amicus Brief *supra* note 16, at 13.

(“Even without misrepresentations, the name of the “Michigan Civil Rights Initiative” itself and rhetoric such as ‘preferential treatment,’ are understandably confusing when they are considered in the context of the general understanding and conventional use of such terms . . .”).

22. The Michigan Civil Rights Commission (hereinafter “MCRC”), the governmental arm responsible for hearing significant civil rights grievances, did not have the

It was no secret that MCRI petition circulators specifically sought to exploit people of color and indigents, particularly African American communities in Michigan. The Michigan Civil Rights Commission (hereinafter "MCRC") convened public forums initially in Detroit and Flint, and later in Grand Rapids, hearing testimony from aggrieved citizens who were allegedly lied to by MCRI circulators. Although the hearings provided a venue for wronged citizens to voice their claims, the MCRC was ultimately a paper tiger, lacking the authority to remove the MCRI from the November 2006 Michigan Ballot.

Nevertheless, forces in Michigan still sought to preempt the MCRI from appearing on the ballot by challenging the proposal by counter-proposal²³ and finally, in federal court. On August 29, 2006 in the United States District Court of Eastern Michigan, Judge Arthur Tarnow ruled in favor of the MCRI appearing on the ballot but supplemented his ruling with *dicta* confirming the allegations of fraud made by hundreds of citizens at the MCRC hearings. He noted that, "[The MCRI] committed voter fraud in obtaining signatures in support of the petition."²⁴ Tarnow ultimately concluded, however, that voters "still have an opportunity to participate in the political process by voting against the proposal in the general election."²⁵ With the MCRI's inclusion on the ballot firmly resolved, protecting affirmative action came down to public education, grassroots activism, and fundraising, all aimed at mobilizing Michigan voters to 'Vote NO on Proposal 2.'

authority to remove signatures from the petition. Furthermore, the Michigan State Board of Canvassers, which certified petitions, was ruled to not have the power to investigate incidents of petition fraud. The only recourse the MCRC could take is reporting their finding to the Michigan State Attorney General and the State Supreme Court, which held the authority to compel revision of the MCRI and remove it from the ballot. On June 7, 2006, the MCRC filed a sixteen-page report to the Michigan Supreme Court [hereinafter "Report of the MCRC"], which "presents evidence of shameful acts of deception and misrepresentation by paid agents." Michigan Civil Rights Initiative ("MCRI"), http://www.michigan.gov/documents/PetitionFraudreport_162009_7.pdf (last visited Mar. 21, 2007).

23. By Any Means Necessary initiated a counter-petition, collecting signatures from Michigan voters asking Governor Jennifer Granholm to remove the MCRI from the ballot by executive power.

24. See Mike Gallagher, *Federal Judge Allows Anti-Affirmative Action Proposal To Go To Michigan Voters*, CMF NEWSWIRE, http://www.cmif.org/news_detailed.asp?ID=1217 (last visited April 3, 2007).

25. *Id.*

II. WHY MICHIGAN?

The United States Supreme Court upheld the decision rendered in *Bakke v. University of California Board of Regents*²⁶ in *Grutter*, holding that race can be narrowly utilized in determining university admission, but only in furtherance of creating a diverse student body:

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant.²⁷

Less than three years later, former University of California-Regent Ward Connerly²⁸ and Jennifer Gratz²⁹ successfully abolished affirmative action by way of ballot initiative in Michigan. In addition to the dismal social and economic conditions on the ground, Michigan proved a ripe candidate for Connerly because of the notoriety surrounding Michigan during and after these cases.³⁰ The Supreme Court cases generated tremendous hostility toward affirmative action among much of its citizenry. Because of the cases, the state itself and its flagship university became the most recognizable entities associated with the affirmative action debate. "Michigan," the "University of Michigan," "Gratz" and "Grutter" became central to the national affirmative action debate. Naturally, Jennifer

26. *Regents of the Univ. of Cal. Board v. Bakke*, 438 U.S. 265 (1978) (a divided court (4-1-4) found that diversity at public universities is a compelling state interest, but race can only be used to bring about diversity, not as a remedial mechanism).

27. *Grutter*, 539 U.S. 336.

28. See Speaker Criticizes MCRI, Calls It a "Misguided Mistake," <http://www.mediabase.org/features/051006speak.php> (last visited Mar. 21, 2007) (Mark Fancher of the Michigan ACLU's Racial Justice Project stated that the MCRI's "backers hired Ward Connerly to be the spokesman for the movement and pay him nearly a million dollars a year, which Fancher joked may make Connerly the wealthiest benefactor of affirmative action.").

29. Plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 (2003) companion case to *Grutter*, challenging the University of Michigan's affirmative action program with regards to undergraduate admissions.

30. CNN.com: Narrow Use of Affirmative Action Preserved in College Admissions, <http://www.cnn.com/2003/LAW/06/23/scotus.affirmative.action/> (last visited April 3, 2007). "[T]he University of Michigan cases were the most significant test of affirmative action to reach the court in a generation."

Gratz,³¹ the successful plaintiff in the affirmative action lawsuit against the university's undergraduate program, was chosen by Connerly to lead the campaign because of her newfound celebrity, which attracted support from those who shared not only her animus for affirmative action, but also her pronounced sense of entitlement.³² It was only fitting, symbolically and strategically, that the "archetypal victim of reverse discrimination"³³ be hired to lead the campaign in her home state.³⁴ Gratz, a working-class, White Caucasian woman from Allen Park, Michigan, rose to prominence after being rejected admission from the University of Michigan's Ann Arbor Campus. Gratz's contention that "lesser qualified minorities" had been admitted in her stead (a claim thoroughly unraveled by expert witness testimony)³⁵ still resonated strongly with much of Michigan, particularly White and conservative voters. Consequently, Michigan again found itself on affirmative action's center-stage. Connerly realized that if affirmative action could not be defeated in the courts,

31. A week before the election in Michigan, the Detroit Free Press (which endorsed a No vote on Proposal 2), ran a glowing article about Jennifer Gratz. The piece provided readers with a short narrative about Gratz, whose staunch sense of entitlement for a coveted seat at the University of Michigan's Ann Arbor campus led to the eventual 2003 Supreme Court case, where she served as lead plaintiff for the undergraduate admissions scheme. Dawson Bell wrote, "[G]ratz, who left behind a good job and a husband in California to return to Michigan, said the ballot campaign is based on the same principle that spurred the lawsuits: That it is wrong to judge people on the color of their skin or their gender. All the good intentions in the world won't change that principle, she said." Dawson Bell, *Affirmative Action: Iron Will Drives Leader for Ban, Gratz Hated, Praised for Pushing Prop. 2*, DETROIT FREE PRESS, Oct. 30, 2006.

32. Like Alan Bakke, who challenged the race-conscious admissions system of the University of California-Davis, decades earlier, Gratz's rhetoric is saturated with a firm belief that she was entitled to a space at the University of Michigan, merely, and mainly, because of her Whiteness and subjectively perceived assessment of merit. Like Alan Bakke, Jennifer Gratz styles her complaint as if she had a legal property right to admissions to the University of Michigan, as discussed by Cheryl I. Harris in relation to Bakke. Harris says, "[B]akke . . . was white, and the special admissions program endangered his property interest in whiteness. The Court demonstrated its sympathetic concern for his interest in this circumstance by deferring to his vested property interest in whiteness and intervening to reorder the situation to this benefit and in accordance with his expectations." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1773 (1993) (hereinafter "Whiteness as Property").

33. As eloquently stated by my former ACLU of Michigan colleague, LGBTQ Project Attorney Jay Kaplan.

34. After all, Gratz was the plaintiff in the winning Supreme Court undergraduate decision (*See generally Gratz*, 539 U.S. 244), while Michiganander Barbara Grutter lost her claim against the University of Michigan Law School.

35. *See* "Final Expert Witness Report of Jacob Silver, PhD and James Rudolph, PhD, from *Gratz v. Bollinger*, 97-75231 (E.D. Mich), November 14, 2000, 9-10. "White applicants (1,243) constituted 46.7% of those admitted with 'lower qualification' than Gratz, as compared to Black applicants (725) who represented only 27.2% of those with 'lower qualifications.'"

Michigan's fledgling social and economic conditions provided a more receptive atmosphere to carry out his objective.

The *Gratz* and *Grutter* decisions proved an opportunity for Connerly to launch an anti-affirmative action initiative in Michigan, which he initially introduced in 2004. Connerly's plan was delayed for two years,³⁶ but it was finally set to appear on the 2006 Michigan State Ballot. The MCRI, like its predecessors, was the political vehicle for "legal colorblindness," which sees equality as *only* achieved through a symmetrical application of the law in every instance and upon every citizen, regardless of race or ethnicity.³⁷ Thus, affirmative action and race-consciousness were gross deviations from the colorblind paradigm, and consequently, deemed preferential treatment, discrimination, and an affront to the 14th Amendment Equal Protection Clause by Connerly and his camp. This perception was sowed not only by intra-state anti-affirmative action efforts but also skewed media coverage following the *Gratz* and *Grutter* decisions. These messages hit the media directly following 2003's affirmation of *Bakke*, which was confirmed by OUM's focus group data:

[P]articipants enter the discussion of affirmative action with misinformation about the extent of the reach of affirmative action programs. Few offer examples beyond quotas for minorities in college admissions and hiring, and there is virtually no discussion of affirmative action programs that benefit women. Even among female participants, programs that target women and girls do not come to mind when affirmative action is discussed.³⁸

Connerly, who fashions himself a civil rights champion—a title misappropriating both the spirit and aims of the movement which entrenched "civil rights" in the national consciousness—claims to descend from that "movement." He refers often to Reverend Martin Luther King's

36. Ritu Kelotra, *Connerly Turns in Signatures for Michigan Anti-Affirmative Action Ballot Initiative*, CIVILRIGHTS.ORG, <http://www.civilrights.org/issues/affirmative/remotepage.jsp?itemID=28377411> (last visited April 3, 2007).

MCRI originally wanted the initiative on the November 2004 ballot. However, several months before the election, a Michigan judge held that the anti-affirmative action initiative was 'blatantly in direct conflict' with the Michigan Constitution and did not fully inform voters of its effect. Connerly eventually ended his efforts due to the court decision and his failure to garner the requisite number of signatures.

37. See Section IV, *infra* for further discussion on colorblindness and its ancillary arguments.

38. Memorandum from Al Quinlan and Liz Gerloff, Greenberg Quinlan Rosner, to Trisha Stein (Feb. 24, 2006) (on file with author).

seminal “I Have a Dream” speech,³⁹ relating his vision that people not be judged by the “color of their skin” to his misdirected conception of colorblindness.⁴⁰ Connerly and his handlers, not short on political savvy and chicanery, knew that manipulating King, inarguably the primary icon of the Civil Rights Movement and with his most remembered proclamation, in their favor would confuse minority voters and also woo White voters. The MLK tug-of-war became a prevailing theme of the affirmative action intellectual and political debate, with both sides declaring rightful claim over his vision and even his likeness. In Michigan, the NAACP-Detroit distributed effective literature displaying King walking hand-in-hand with fellow civil rights icon, and Detroit native, Rosa Parks, geared specifically to the African American community. Likewise, the ACLU of Michigan developed a website exclusively addressing the MCRI bearing King’s likeness.⁴¹ The battle for the Civil Rights Movement’s iconography and vision again unfolded during the MCRI campaign, further confusing voters, particularly voters of color. Generating confusion and panic, however, was an integral part of the MCRI’s strategy, aimed at destabilizing affirmative action base supporters.

Although formally codified as law in the 1960’s, affirmative action’s seeds date as far back as the 1930’s, when U.S. Supreme Court Justice Harlan Stone wrote,

[N]or need we enquire whether similar considerations enter into the review of statutes directed at particular religions . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,

39. Delivered on August 28, 1963, at the Lincoln Memorial in Washington, DC (hereinafter “I Have a Dream”), “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”

40. Time 100: Martin Luther King, Jr., <http://www.time.com/time/time100/leaders/profile/king.html> (last visited Mar. 22, 2007). “In recent years, however, King’s most quoted line—‘I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character’—has been put to uses he would never have endorsed. It has become the slogan for opponents of affirmative action like California’s Ward Connerly, who insist, incredibly, that had King lived he would have been marching alongside them. Connerly even chose King’s birthday last year to announce the creation of his nationwide crusade against ‘racial preferences.’”

41. The site was developed by University of Michigan American Culture graduate student Aimee Van Bokkel and the author. See “The MCRI Stands for Neither Civil Rights Nor Michigan,” Aimee Van Bokkel and Khaled A. Beydoun, *available at* <http://www.aclumich.org/modules.php?name=Sections&op=viewarticle&artid=184>.

and which may call for a correspondingly more searching judicial inquiry.⁴²

Approximately a decade after *Brown v. Board of Education*⁴³ reversed the “separate but equal” doctrine,⁴⁴ President John F. Kennedy enacted into the law the Civil Rights Act,⁴⁵ which laid the foundation for progressive race-based policies, including affirmative action. Finally, the landmark *Brown* declaration made a decade earlier was given political teeth.

Over the course of the following decades, affirmative action was gradually tweaked, reshaped and materially reformed by the courts. *Bakke* legally shifted affirmative action’s identity and alienated it from its original mission, which was an inherently remedial and democratic one.⁴⁶ Activating *Brown*’s spirit, affirmative action programs provided the nuts and bolts to integrate oppressed and marginalized Americans as full-fledged citizens, chiefly by providing better access to education.⁴⁷ Post-*Bakke*, affirmative action was judicially transformed from a remedial policy, aimed at proactively correcting *de jure* segregation and creating opportunities for African Americans and other marginalized groups, into a narrowly-tailored proxy solely employed to bring about diversity on college campuses, as evidenced in *Grutter*. As a result, affirmative action’s policy objective changed, yet the common myths associated with it on the ground did not. Largely, Americans incorrectly consider affirmative action quota-based, a set aside or a

42. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

43. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). “[W]e conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal . . . We have now announced that that such segregation is a denial of equal protection.”

44. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), where Justice Brown wrote in the majority opinion, “The object of the 14th Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to the other.”

45. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

46. See Luke Charles Harris, *Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools*, 9 Mich. J. Race & L. 1, 2 (2003). “Our brief carefully reframes the terms of the affirmative action debate by placing contemporary remedial concerns rooted in problems of institutional discrimination at its center. Those concerns were not considered in the *Grutter* case. We contend that remedying such problems will ultimately lead to more diverse environments in different domains of American life, with all of their attendant benefits. Diversity, then, remains a major component of our analysis. We argue, however, that it represents a complementary justification for affirmative action rather than the core justification for it.”

47. *Id.* at 20. (“The idea that public education ‘is the very foundation of good citizenship’ and is ‘required in the performance of our most basic public responsibilities’ is central to this Court’s repudiation of segregation in *Brown*. The *Brown* court specifically emphasized that public education allowed for the instilling of civic values and facilitated the adjustment of student to our democratic culture.”)

handout, and still assert that its lone beneficiaries are African Americans.⁴⁸ This was very much the sentiment on the ground in Michigan, even among some of the policy's supporters.

Proponents of affirmative action counter that inequality does not exist in a vacuum, but must be contextualized within the historical and contemporary socioeconomic, political and legal conditions that are intimately linked to race. Moreover, proponents contend that every dimension and institution of society is in fact racialized, and *colored* by an epistemology founded upon racial exclusion and White hegemony.⁴⁹ Affirmative action's *raison d'être* was remedial, intended to both formally address these injustices levied against oppressed and marginalized segments of American society and gradually chip away at the culture of racial exclusion. Namely, affirmative action was a comprehensive governmental intervention to undo vestiges of *de jure* segregation and facilitate racial integration, and the centerpiece of the sweeping social policy that mobilized the vision of *Brown v. Board of Education*. *Bakke* was a departure from that mission, which *Grutter* sustained twenty-five years later. Although affirmative action was upheld, the *Grutter* decision was not celebrated by civil rights advocates *in toto*, particularly those championing a fundamental brand of affirmative action emphasizing its remedial spirit. They maintain that the state must remain an active agent in undoing inequality along racial lines.⁵⁰ Luke Charles Harris, who served as an instrumental contributor to the campaign against the MCRI,⁵¹ observed:

We need to remember that the world in which affirmative action policies were initiated was a world where a great many prestigious institutions and professions were almost exclusively enclaves of upper class White men,⁵² and where the many

48. I will discuss this more elaborately in reference to the OUM Focus Group sessions in subsequent chapters of the piece.

49. "[C]olorblindness is a form of race subordination in that it denies the historical context of white domination and Black subordination. This idea of race recasts privilege attendant to whiteness as legitimate race identity under 'neutral' principles . . . The use of colorblindness as the doctrinal mode of protecting the property interest in whiteness is exemplified in three affirmative action cases decided by the Supreme Court: *Bakke*, *Cross*, and *Wygant*." HARRIS, *supra* note 33, at 1768, 1769.

50. HARRIS, *supra* note 47, at 2. "Most importantly, it failed to connect the rationale for affirmative action policies to historical and contemporary forms of racism."

51. Harris is a co-founder of the African American Policy Forum ("AAPF"), a leading racial justice think-tank that collaborated closely with the ACLU of Michigan in public education efforts geared toward base groups. The AAPF website can be visited at <http://www.aapf.org>.

52. This is still true today, particularly when related to prestigious employment ranks and positions in society's halls of power. "White men make up 48 percent of the college-educated workforce, but hold more than 80 percent of the top jobs in U.S. corporations, law firms, college faculty, governments, and news media." Facts on Affirmative

blue-collar trades were predominantly the preserve of White working-class men.⁵³

Extending Harris's assertion, Kimberlé Crenshaw⁵⁴ contemporizes affirmative action as, "a set of policies that function to equalize opportunity in the face of ongoing patterns of . . . exclusion."⁵⁵ Affirmative action's corrective mission and rehabilitative spirit, duly articulated in the scholarship of Crenshaw and Harris, and deployed by the on-the-ground presence of the African American Policy Forum, their think-tank, provided the ideal resources to help educate base groups and communities. Critical Race scholarship and praxis, which deconstructed fabrications and myths about affirmative action, led by the seminal works of Crenshaw and Harris, provided the intellectual foundation for the public education outreach into communities of color. Crenshaw and Harris convened several workshops on the ground in Michigan⁵⁶ and allocated a handy workbook, *Affirmative Action Myth-busters*, which identified and subsequently critiqued the most common misrepresentations about affirmative action. Intensive workshops, such as the day-long session held at the Wayne State University School of Law, provided Michigan pro-affirmative action leaders and activists with a comprehensive training in affirmative action history, a crash-course on the most common myths about affirmative action, and guidance in tailoring focused messaging and public education strategy.⁵⁷

Action and Asian Pacific Americans, http://www.fairchance.org/research_center/remotepage.jsp?itemID=28326987 (last visited Mar. 22, 2007).

53. Luke C. Harris & Uma Narayan, "Affirmative Action as Equalizing Opportunity: Challenging the Myth of 'Preferential Treatment,'" in *ETHIC OF PRACTICE* 488, 494 (Hugh LaFollette ed., Blackwell Publishing Professional 2d ed. 2002) [hereinafter "Affirmative Action in Equalizing Opportunity"].

54. Crenshaw was also an indispensable contributor to the ACLU and AAPF's collaborative work on the ground in Michigan against the MCRI (Crenshaw is also a co-founder of the AAPF, and currently teaches law at the UCLA School of Law and Columbia Law School).

55. Kimberlé Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 196 (1998) [hereinafter "Playing Race Cards"], available at <http://www.aapf.org/pages/racecard.html>.

56. Two workshops were convened in March 2006, and subsequent workshops were held in June and October 2006.

57. The June 20, 2006 workshop entitled "Mobilizing Our Base Against the MCRI: United Against Ward Connerly," was held at Wayne State University Law School and attracted roughly 120 participants from across the state. The workshop was co-sponsored by twenty-five Michigan-based organizations.

III. REINVESTING IN MICHIGAN'S RACISM:
DE FACTO SEGREGATION, THE NEW BOTTOM LINE

Any account addressing race, economic justice or affirmative action in Michigan must be prefaced with a general survey of the state's, and particularly Detroit's, racially volatile history. Detroit's degree of hyper-segregation ranks it among the worst in the country,⁵⁸ if not the worst,⁵⁹ and Michigan's aggregate racial segregation is quite dire.⁶⁰ Michigan's racial polarization exists on various plateaus, but what is most striking is the geographical separation that nearly mirrors the racial segregation.⁶¹ Detroit's spatial and geographic segregation is perhaps its most well-known characteristic today. The oft-celebrated 8-Mile road, which separates Black from White and rich from poor, has effectively succeeded the Motown sound and "The Motor City" as the Detroit's lasting image, particularly with the continuing spiral of the automobile industry.⁶² My routine travels during the campaign retraced the neatly demarcated boundaries separating Black from White, rich from poor. Metropolitan Detroit is a grossly segregated landscape, a climate that has only been exacerbated by the downward spiraling Michigan economy.⁶³ I was gradually desensitized to

58. Douglass S. Massey & Nancy A. Denton, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 221 (Massey and Denton, Harvard University Press 1993) (1993). "As of 1990, eight metropolitan areas [including Detroit] had segregation indices above 80, indicating an extreme separation of the races."

59. Milad Eshaq, *Detroit Most Segregated Area in the Country*, *THE SOUTH END*, Dec. 1, 2005. ("According to the 2000 US Census Bureau, the Detroit area is officially the most racially segregated metropolitan area in the United States.")

60. The Potential Impact of the Michigan Civil Rights Initiative on Employment, Education and Contracting, available at <http://www.aclumich.org/pdf/mcriimpactededucationemployment.pdf> (last visited Mar. 23, 2007) [hereinafter "Potential Impact of the MCRI"]. "Three of the top 10 and five of the top 25 most segregated cities in the country are in Michigan, and the Detroit metropolitan area is the second most segregated in the nation . . ."

61. See MASSEY & DENTON, *supra* note 59, at 92, 93., "[W]hites were asked how they felt about hypothetical neighborhoods that contained Black and White homes in different proportions. In their responses, Whites indicated they were still quite uncomfortable with the prospect of Black neighbors in practice, despite their endorsement of White open housing in principle . . . Once a neighborhood reached about one-third Blacks, the limits of racial tolerance were reached for the majority of Whites . . ."

62. Joe Benton, *Big Three Look For Help on Capital Hill*, *CONSUMERAFFAIRS.COM*, http://www.consumeraffairs.com/news04/2006/05/automakers_congress.html (last visited Mar. 23, 2007). "The three automakers are in the midst of huge changes that include thousands of job layoffs and plant closings in response to losing market share to foreign competition."

63. See QUINLAN & GERLOFF, *supra* note 39, at 2. One focus group participant ideally summarized the general sentiment in Michigan because of its desperate economic situation, testifying that, "I just get so angry because of a situation that the environment has put me in, that I've put myself in. I lost my job. I lost my house. There's a lot of stress." Another

the juxtaposed images of extravagant estates in Bloomfield Hills⁶⁴ and the ubiquitous sight of barren, tattered homes in the various quarters of Detroit proper. Such contrast became routine during my daily travels to and from meetings and presentations. My drives through the state's suburbs and inner-city sections only affirmed that affirmative action was still sorely needed—or as one high-school student plainly stated, “affirmative action should be increased, not taken away.”⁶⁵

Metropolitan Detroit's various neighborhoods and suburbs are sharply homogenous, with individual racial groups virtually monopolizing entire sections. Oakland County's extremely affluent suburbs are predominantly White, while the ethnic enclaves of Detroit house tightly concentrated communities of color. Therefore, although metropolitan Detroit and Michigan statistically appear to be quite racially and ethnically diverse, coexistence and meaningful inter-community interaction is effectively non-existent. In addition, cross-cultural literacy is minimal at best. Naturally harkening the repercussions of the racial powder-keg that was Detroit during the late 1960's race rebellions,⁶⁶ the racial demography that ensued is not only a living relic of that chapter of Detroit's recent history, but also an ever present testament of the robust racial tension and racist spirit that continued after the rebellions.

As the racial demography of Detroit changed, neighborhood groups demarcated racial boundaries with great precision, and, abetted by federal agencies and private real estate agents, divided cities into strictly enforced racial territories . . . White neighborhoods became “battlegrounds” where residents struggled to preserve segregated housing.⁶⁷

Detroit's culture of separation further entrenches racial tension and eliminates opportunities for cross-cultural exposure and communication. As a result, the rare incidents of intermingling often result in tension and violence, which further aggravates division. The abolition of affirmative action and equal opportunity programs will surely pronounce this racial

participant observed, “[Y]ou go in another state and people seem happy and everything else. We just live in a state that is not doing good right now.”

64. Bloomfield Hills is an affluent suburb of Detroit, north of the city in Oakland County.

65. Quote from student attendee of the Proposal 2 Townhall Meeting, entitled “The Last Stand,” held by Detroit Parent Network at Youthville in Detroit, Michigan (Oct. 18, 2006).

66. See MASSEY & DENTON, *supra* note 59, at 58 “[T]he economic deprivation, social isolation, and psychological alienation produced by decades of segregation bore bitter fruit in a series of violent urban riots in the 1960's . . . The violence was particularly destructive in Detroit . . .”

67. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 246 (Princeton University Press 1998) (1996).

balkanization, given that it was perhaps the only serviceable bridge facilitating meaningful interaction between the various racial communities.

Formerly vibrant economic centers like Flint and Ypsilanti, which once housed bustling General Motors plants only to be later decimated by their desertion,⁶⁸ also remind residents of what Michigan's current depression could mean for the remainder of the state.⁶⁹ Amid this backdrop of economic despair, racism was amplified, due to a culture rife with robust xenophobia and general animus toward immigrants, particularly Arabs, Muslims⁷⁰ and Latinos.⁷¹ Michigan's racial segregation, in turn, provided an ideal landscape for the MCRI. Given that the University of Michigan Supreme Court decisions⁷² left a bad taste in the mouths of many Michiganders who blamed their misfortune on minorities, Mexicans, and affirmative action, Michigan was an opportune target for Connerly.

Public sentiment in regards to the MCRI was extremely difficult to gauge throughout the campaign. Many White voters surveyed disingenuously, stating that they would "vote no" for fear of being branded a racist, but in fact voted in favor of the proposal; a phenomenon that ultimately undermined the predictive value of the polls. The volatility of the polls, combined with the considerable discrepancy in the official tally, affirmed that voters are still largely dishonest about race and racial issues.⁷³ Dishonesty oftentimes cloaks a more troubling reality: the mutation of blatant

68. GM left Flint in 1989, and closed their Willow Run plant in Ypsilanti, eliminating roughly 16,000 jobs, in 1991. Warren Brown, *GM Loses Record \$4.5 Billion; Announces 12 Plant Closings*, THE WASHINGTON POST, Feb. 25, 1992.

69. As illustrated in Michigan filmmaker Michael Moore's 1989 film, *Roger and Me*, released on Dec. 20, 1989. See also Film Review, *Surveying What's Left When G.M. Leaves Town*, N.Y. TIMES, Dec. 20, 1989, available at <http://query.nytimes.com/gst/fullpage.html?res=950DE2DD1E38F933A15751C1A96F948260>. "Flint, Mich., population 150,000, the birthplace of General Motors. As a result of the closing of various G.M. plants and the elimination of 40,000 jobs, Flint has become one of the more embarrassing eyesores in the landscape of what is supposed to be a booming American economy.

70. See generally David G. Ayouby, K.K., "Being Arab and Becoming Americanized: Forms of Mediated Assimilation in Metropolitan Detroit," in *MUSLIM MINORITIES IN THE WEST: VISIBLE AND INVISIBLE* (Haddad Yvonne Yazbeck & Jane I. Smith eds., 2002).

71. Which was aggravated exponentially after the introduction of House of Representatives' Bill 4437, "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005," available at <http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109ki0xy4> (last visited Mar. 26, 2007).

72. See generally *Grutter* 539 U.S. 306 and *Gratz*, 539 U.S. 244.

73. For instance, the Free Press-Local 4 Michigan Poll, conducted in June 2006, found that, "[A] plurality of likely voters (48%) said they oppose a constitutional amendment to ban the use of race and gender-based preferences . . . The proposal, known as the Michigan Civil Rights Initiative, was favored by 43%, with 9% undecided . . . A Free Press survey conducted in February 2003, shortly before the Supreme Court ruling, found that Michiganders opposed U-M's affirmative action admissions policy 63% to 27%." Dawson Bell, *Affirmative Action Proposal Loses Support: Poll Shows Ban Faces Challenge*, THE DETROIT FREE PRESS, July 18, 2006.

racism into subconscious racism. Roughly a week before the election, former Mayor of Detroit Dennis Archer wrote in the *Detroit Free Press*,

[E]ven in their worst moments, the citizens of Mississippi, Alabama, Georgia, Louisiana, North or South Carolina, Tennessee, Kentucky, Texas or Florida—all deep South states with their histories of racial inequality and hostility—never voted to nullify a historic U.S. Supreme Court civil rights decision that paved the way for racial integration. But that is exactly what the citizens of Michigan are being asked to do by a cabal of people funded and organized largely from outside of the state.⁷⁴

Michigan voters, inconspicuous within the private confines of the voting booth, responded resoundingly to Connerly. Merely decades after Detroit's race rebellions, Michigan voters squared against one another over issues of race and marginalization, but this time at the ballot box. The tally on November 7, 2006 demonstrates that little progress has been made since Detroiters took to the streets to unleash their angst over the assassination of Martin Luther King. Racism, though less explicit, is as prevalent today as it was when affirmative action was birthed.

OUM brought together organizations and institutions that represented every segment and sector of Michigan, duly reflecting the diversity of those supporting affirmative action and equal opportunity programs. Civil rights organizations, ethnic and community-based groups, corporations, religious institutions and chambers of commerce came together against the MCRI,⁷⁵ in turn, convening an unprecedented coalition that brought both Republicans and Democrats, and other traditional adversaries, to the same table. The diverse, bipartisan character of the coalition served as one of most effective images, and messages, deployed by OUM during the campaign.

The fact that Michiganders from all walks of life are united in opposition to the initiative is one of the biggest “eye openers” for participants—it cuts through pre-existing thoughts on affirmative action and affirms many participants' growing concerns of the initiative. When given a list of groups and individuals opposed to the initiative at then end of each [focus] group, participants take strong notice that such a diverse group

74. Dennis Archer, *Local Comment: MCRI Would Set Back Civil Rights by Decades*, THE DETROIT FREE PRESS, Oct. 31, 2006.

75. Major Michigan corporations provided much of the funding for OUM, led by General Motors, Ford Motor Company and Daimler-Chrysler. See Harry Stein, *A Preemptive Surrender: Michigan Republicans are AWOL in the Fight Against Racial Preferences*, THE CITY JOURNAL, Spring 2006, available at http://www.city-journal.org/html/16_2_sndgs01.html [hereinafter “A Preemptive Surrender”].

is in agreement on this issue. Specifically important is that the opposition is bipartisan, and includes groups and individuals that participants are surprised to see publicly oppose the affirmative action ban.⁷⁶

Ultimately, well over one hundred organizations comprised and sponsored OUM, while the only public endorsement the MCRI received came from the Michigan State Ku Klux Klan.⁷⁷ The MCRI's opponents also included conservatives Dick Devos⁷⁸ and Mike Bouchard,⁷⁹ the Republican candidates who ran for Gubernatorial and Senate seats, respectively.⁸⁰

In January 2006, OUM held ten focus groups to test the ballot language and potential campaign messages to prospective voters.⁸¹ Given the state's overwhelming White majority, a critical mass of White votes was vital to defeat the MCRI. Therefore, OUM shaped an almost exclusively gender-based defense of affirmative action as the principle representation, and foundation, of their campaign against the MCRI. Race-based messages were, at best, supplementary.⁸² Gender-based messages, namely those demonstrating strides made by women because of affirmative action programs, were leveraged to woo White voters. Naturally, the policy realm, unlike the courts, presented the opportunity to field arguments for affirmative action free from binding precedent or judicial constraint. Therefore, OUM had the chance to field a more effective set of messages tailored to further integrate African Americans, and other communities,

76. See Highlights of Survey Results, *supra* note 15, at 6.

77. Vanessa Notman, Only Open Endorsement of Proposal 2 Came from Hate Group, *THE STATE NEWS*, Nov. 15, 2006, available at http://www.statenews.com/op_article.phtml?pk=38733 ("Despite the title of this backward proposal, according to Mark Bernstein of the Michigan Civil Rights Commission, not one notable civil rights group support this ballot measure. In fact, Bernstein says in a 40-second clip . . . that 'the only large organization that's endorsed the MCRI is the Klu Klux Klan.'").

78. See Press Release from Dick DeVos for Michigan Governor, "Statement by Dick DeVos Regarding MCRI Initiative," Oct. 31, 2005, available at <http://www.aclumich.org/mcridocuments/links/devosstatement.pdf>.

79. Michael O'Brien, *Preferences Preferred: Michigan Republicans Line Up Against the MCRI*, *NATIONAL REVIEW ONLINE*, June 14, 2006, available at <http://article.nationalreview.com/?q=NWNjMDM0ZmFmMzYyYjk3ZjBiOGZlYjc2YWwRlOTk1NTI>. "Oakland County sheriff Mike Bouchard, the leading GOP candidate for Senate, is also against the MCRI: 'Anytime there's an effort to amend and change the constitution, it always gives me pause.' He argues that the MCRI is too ambiguous. 'This language would be a constitutional hurdle for a same sex public school, which I believe are not only worthwhile, but valuable.'"

80. See A Preemptive Surrender, *supra* note 76, at 1.

81. Six of the sessions were held in Southfield, a suburb of Detroit in Oakland County, two were in Saginaw and two were in Grand Rapids.

82. This is best evidenced by OUM's official campaign talking points, "Michigan United: Strength Through Diversity," available at http://www.aclumich.org/mcridocuments/educational_materials/handouts/oneunitedmitalkingpoints.pdf.

into the campaign. Like the *Bakke* court, OUM intentionally sidelined the salience and visibility of race⁸³ and considered affirmative action's remedial mission taboo, or in fundamental opposition with messages that would predictably win over White voters.

[I]ndeed, nonrepresentation of minority interests has been the acknowledged rule in almost every national debate over who should bear the cost of remedial measures designed to rectify past racial discrimination. Not surprisingly, then, racial remedies for blacks [and other minorities] historically have represented policies tending to provide benefit or advantage to whites, with the cost of such self-proclaimed "remedies" usually assessed to and paid for by the intended beneficiaries.⁸⁴

In line with Bell's baseline, OUM chose mainstream and *safe* messages it believed would resonate with White, undecided voters.⁸⁵ The political trade-off favoring White voters, in turn, compromised the level of attention to communities of color, affirmative action's "intended beneficiaries."⁸⁶ Echoing Derek Bell's position that strident civil rights reform is only achieved if a change from the status quo also benefits Whites,⁸⁷ OUM was numerically correct in assessing that victory required a significant portion of the White vote, but miscalculated by grossly neglecting communities of color.⁸⁸ Specifically, OUM compromised its ability to

83. See DEREK BELL, *RACE, RACISM AND AMERICAN LAW* 253 (Aspen Publishers 2000) [hereinafter "Race, Racism and American Law"]. "Minority representatives, potentially and properly the star players in the *Bakke* drama, found themselves relegated to the wings trying to make themselves heard . . . If minority groups had been represented directly in the *Bakke* case, they would have brought a sorely needed realism to litigation." Likewise, a fuller engagement of minority groups and race at large, would have, in the words of Bell, 'brought a sorely needed realism' to the campaign against Proposal 2 in Michigan.

84. *Id.* at 254-55.

85. OUM's public education efforts centered on three core messages: 1) The MCRI would roll back the progress made by women and minorities 2) The MCRI is led and funded by out-of-state elements, and 3) Michigan is coming together against the measure. See "Don't Roll Back Progress: No on 2" flyer, One United Michigan Campaign Flyer, available at <http://www.oneunitedmichigan.org/pdf/dontbefooledAUGUST.pdf>.

86. See *Race, Racism and American Law*, *supra* note 84, at 255.

87. See generally Derek Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

88. A sentiment echoed by prominent affirmative action expert Tim Wise, who spoke at the University of Michigan on March 21, 2005: "[W]ise insisted that the focal point of affirmative action should be race and that focusing on that aspect was the only way to garner support from the public to stop MCRI. Wise said the biggest mistake a defender of affirmative action can make in the fight against the MCRI is to run away from race and switch the focus to gender. Amber Colvin, *Wise: Race, Not Women, the Issue in MCRI*, MICHIGAN DAILY, Mar. 22, 2005, available at <http://>

craft messages that duly intertwined gender and race-based critiques of the MCRI, and defenses of affirmative action. OUM blundered by remaining too steadfastly uniform in its popular campaign messaging, refusing to be malleable in its message to embrace the oft-intersecting and layered identities of voters:

There is, then, no need to pit class against race (or against gender) as the only valid basis for affirmative action. An array of factors that contribute to institutional discrimination—such as class, race, gender and disability—should be taken into account. When several factors intersect and jointly contribute to a process of discrimination, as in the case of a working-class Black woman, each factor should be considered.⁸⁹

The campaign provided a unique opportunity to address Michigan's marked segregation and palpable racial tension; an opportunity, which unfortunately, was not fully explored by OUM.

Ultimately, Proposal 2 won by a comfortable margin—58% to 42%.⁹⁰ Persuadable Whites were largely in favor of the proposal, voting 56% “Yes” to 42% “No.”⁹¹ Base groups,⁹² however, resoundingly voted against the proposal. 86% of African Americans voted “No”, while 12% voted “Yes”; 69% of Latino-Americans voted “No”, while 27% voted “Yes”;⁹³ the heavily Arab American Eastside of Dearborn voted at almost a 2-to-1 margin against the initiative.⁹⁴ Even union households, which are suffering the brunt of Michigan's wayward economy, voted against Proposal 2 by a ten-percent margin (54% to 44%).⁹⁵

media.www.michigandaily.com/media/storage/paper851/news/2005/03/22/News/Wise-Race.Not.Women.The.Issue.In.Mcri-1429634.shtml.

89. See *Affirmative Action in Equalizing Opportunity*, *supra* note 54, at 498.

90. See *Affirmative Action Ban Ok'd*, *supra* note 7, at 1.

91. See “Statewide Exit Poll, November 7, 2006, 3000 Voters Surveyed for Detroit News” available at <http://www.debatingracialpreference.org/MCRI-Polls.htm> (last visited Mar. 26, 2007) [hereinafter “Proposal 2 Voter Breakdown”].

92. “Base groups” include communities of color and organizations allied and in support of affirmative action.

93. See *Proposal 2 Voter Breakdown*, *supra* note 92, at 3.

94. See Arab American Institute (“AAI”) “City of Dearborn General Election Summary Report,” November 13, 2007 (on file with author). AAI's website can be visited at <http://www.aaiusa.org/>. The City of Dearborn at large, however, voted roughly 57% to 43% in favor of Proposal 2 (at 5).

95. See *Proposal 2 Voter Breakdown*, *supra* note 92, at 3.

IV. PRACTICE WHAT YOU PREACH: EXPOSING THE
CONTRADICTIONS OF COLORBLINDNESS

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

—Reverend Martin Luther King⁹⁶

Although they are presented as principled spokespersons for colorblind values, few can doubt that race is the key factor defining their strategic value in this game. Indeed color-conscious tactics are routine elements in the color-blind arsenal.

—Kimberlé Crenshaw⁹⁷

A century after *Plessy*, the movement to reinstall a formal regime of White privilege was officially launched with the passage of Proposition 209 in California. Armed with deep pockets and a long-term strategy, colorblind advocates honed a political program to carry out their ideological vision, based paradoxically on Martin Luther King's dream. King was symbolically displaced and illegitimately erected to expedite a politico-legal campaign diametrically opposed to his spirit and vision. This conceptual juxtaposition typifies the character of colorblindness, which is devoid of both context and consistency. Colorblindness places race in a vacuum void of any social or historical contextualization, and lobbies that, "racism is irrational because race is seen as unconnected from social reality, a concept that describes nothing more than a physical presence."⁹⁸ The ideological contest part and parcel of the MCRI campaign, which jostled over the salience and substance of race, fed the political messaging that was deployed on the ground. For the majority of Michigan voters, of color or otherwise, the superficial appeal of colorblindness was almost undeniable. However, a gross majority of the state's populace knew very little about the material aims and substance of colorblindness, as ideology and a political movement.

Colorblindness, as a legal paradigm, mandates a consistent and categorical application of the law that not only dismisses the salience of race, but ignores its existence. Theoretical consistency is indeed the hallmark of colorblindness, but a related hallmark is its functional inconsistency. Deconstructing colorblindness, during the Michigan campaign, was an

96. See *I Have a Dream*, *supra* note 40.

97. *Playing Race Cards*, *supra* note 56, at 4.

98. Neil Gotanda, *A Critique of the Constitution is Colorblind*, 44 *STANFORD L. REV.* 1, 48 (1991).

essential precursor for critiquing the political messages deployed to the public. This segment of the public education effort was no easy task, yet it became a centerpiece feature of our efforts; affirmative action activists, namely, required the intellectual artillery to effectively combat the collective myths about affirmative action.⁹⁹

Part and parcel of colorblindness is its insistence on a "pure meritocracy," a myth that measures one's qualifications by exclusively objective, quantitative and impersonal criteria.¹⁰⁰ This myth was particularly effective in Michigan with White voters, principally because Michigan's stark segregation acted as an impenetrable wall that blinded this demographic from the life on the other side of the tracks. As a result, any opportunity for cross-racial literacy is non-existent, and the destitute conditions of predominantly of color communities are seldom attributed to the governmental actions that birthed them. Rather, racial stereotypes are used to justify inequalities, and the government is dismissed of any responsibility. Thus, government action to cure these conditions is generally perceived as preferential and an affront to meritocracy. Meritocratic principles assert that:

Individual effort and hard work determines who becomes prosperous and wealthy in the United States. Given this reality, it is unfair to say that racial disparities with respect to wealth were created by our government. Thus, government should stay out of the business of trying to eliminate these disparities through the creation of affirmative action programs.¹⁰¹

Like meritocracy, colorblindness *in toto* is premised on a rigid formalism that requires a uniform application of the law across racial lines. Equality, therefore, is achieved only with an unwavering symmetry; a legal

99. This work was led by the ACLU of Michigan and the African American Policy Forum.

100. Cheryl I. Harris articulates the Supreme Court's embrace of meritocratic formalism in *Bakke*, "[T]he majority of the Court was willing to validate Bakke's expectation because the special admissions plan violated neutrality, when 'neutrality' was a colorblind decision process based on 'objective merit' . . . The Court assumed that merit in this context meant superior GPA's and MCAT scores and these were objective, neutral measures beyond serious challenge . . . Merit could in fact mean something quite different, such as the probability that the individual would make a contribution to the profession. Bakke's presumptions about merit were also the Court's presumptions and formed an essential part of the idea that Bakke had a specific right to be admitted to medical school based on a 'universal' definition of merit. This reductive assessment of merit obscures the reality that merit is a constructed idea, not an objective fact. There are few, if any, self-evident, universally agreed upon, objective criteria that comprise merit because merit itself is a fluid, ever-changing objective." *Whiteness as Property*, *supra* note 33, at 1771.

101. "Affirmative Action Mythbusters," produced by the Affirmative Action Research & Policy Consortium of the African American Policy Forum, available at <http://www.aapf.org/focus/>.

calculus of which race plays absolutely no part.¹⁰² Any deviation from this baseline unequivocally merits illegality and unfairness, regardless of the idiosyncratic (legal or sociopolitical) experience of a particular individual, racial group or ethnic community. Keepers of the colorblind brain trust, of which sociologist Shelby Steele is a part,¹⁰³ contend that affirmative action is an egregious affront to this vision. Furthermore, advocates of colorblindness steadfastly hold that access to higher learning, employment, and societal halls of power should exclusively be achieved by measurable rulers, devoid of any consideration of social context.

Therefore, beneficiaries of affirmative action are considered unqualified because merit and race-conscious affirmative action programs are not only mutually exclusive, but in direct opposition. Under this logic, race or gender conscious admissions or employment strategies not only undermine a system purely based on merit, but also “stigmatize” those subjects they intend to assist. Premised on the American pillars of liberalism and the Protestant work ethic, colorblindness is rigidly principled while pragmatically negligent, summarily overlooking the history of American apartheid, *en route* toward a romantic yet exclusionary ideal.¹⁰⁴ Duncan Kennedy breaks down this perspective, which he calls “color-blind meritocratic fundamentalism:”

Racial discrimination is stereotyping: there is no reason to believe that race in any of its various socially constructed meanings is an attribute biologically linked to any particular meritorious or discreditable intellectual, psychological, or social traits of any kind . . . Racial discrimination is unjust because it denies the individual what is due him or her under the society’s agreed upon standards of merit . . . Academic institutions should strive to maximize the production of valuable knowledge and also to reward and empower individual merit . . . Institutions distributing honor and opportunity should therefore do so according to criteria that are blind to race, sex, class, and all other particularities of the individual except the one particularity of having produced work and value.¹⁰⁵

102. Crenshaw counters, “[E]qual treatment prevails so long as race is ignored. Of course, so long as race itself is an asymmetrical social concept, colorblindness will simply reproduce those asymmetries in the name of racial equality.” See *Playing Race Cards*, *supra* note 56, at 8.

103. See Shelby Steele, *The Age of White Guilt, And the Disappearance of the Black Individual*, *HARPERS’ MAGAZINE*, Nov. 2002, [hereinafter “The Age of White Guilt”].

104. See Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 *MD. L. REV.* 97, 139-140 (1998).

105. Randall Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, *Frontiers of Legal Thought III*, 1990 *DUKE L.J.* 709.

Consideration of race, gender or the individual apart from his or her output or work product, therefore, violates the tenants of meritocracy and the American liberal tradition, while also legitimizing the objectivity of race and racial stereotyping. Connerly and his policy instruments have been designated as the political vehicles for implementing this societal worldview. The MCRI/Proposal 2 literature passed out to voters contained the following messages:

1. Proposal 2 reflects the colorblind language of the 1964 Civil Rights Act—because equal treatment is the essence of civil rights,
2. Proposal 2 ends discrimination against groups and individuals based on race or sex for state employment, university admissions, and public contracting, and,
3. Proposal 2 bans quotas and set-aside programs giving every person a fair chance to compete for good paying jobs and college admissions.¹⁰⁶

Yet, the far from fluid transfer from concept to campaign illustrates the inherent flaws of colorblindness. Ward Connerly, the visionary and political mouthpiece of the MCRI, was in fact chosen to occupy these roles primarily because of his identity as a Black man. Connerly's niche, moreover, is indispensable because he brings to the fore a Black face to legitimize the interests of his primarily White and wealthy backers. Thus, the strategic manipulation and insertion of his Blackness is a blatant violation of colorblindness, in that the value of his phenotype inarguably pronounces the resonance of his presentation and his capacity to win over minds and votes.¹⁰⁷ Moreover, Connerly's yearly "salary" of \$1 million evidences that his investment in colorblindness is perhaps fueled as much by greed as it is by principle.¹⁰⁸ As a result, Connerly's role makes him one of the most lucratively remunerated affirmative action beneficiaries, considering that his Blackness is clearly the most important criterion in

106. "Vote Yes on Prop. 2!" handout, made available by the Michigan Civil Rights Initiative Committee, P.O. Box 18243, Lansing, MI 48901.

107. See *Playing Race Cards*, *supra* note 56, at 3–4. ("Ward Connerly, Clarence Thomas and other Black spokespersons—themselves beneficiaries of these policies—urge us to believe that that affirmative action lowers standards when in fact it broadens the terms of inclusion. Although they are presented as principled spokespersons for colorblind values, few can doubt that race is the key factor defining their strategic value in this game. Indeed color-conscious tactics are routine elements in the color-blind arsenal.")

108. On August 2, 2006, Congressman John Conyers, Jr., (D-MI), filed an IRS complaint regarding the excessive and suspect payments made to Connerly, which were allegedly not filed in his organization's, (The American Civil Rights Institute), taxes. Marc H. Morial, *Time for Connerly Anti-Affirmative Action Crusade to Be Put in Permanent Retirement*, CIVILRIGHTS.ORG, Oct. 5, 2006, available at http://www.civilrights.org/press_room/buzz_clips/op-ed-time-for-connerly-anti-affirmative-action-crusade-to-be-put-in-permanent-retirement.html.

meriting his position. Although among the most visible, Connerly is not the lone prominent conservative of color championing colorblindness, joined by Supreme Court Justice Clarence Thomas,¹⁰⁹ Alan Keyes, and Michigan State Professor William Allen, another leading figure in the pro-MCRI campaign. Scholars championing colorblindness, like Shelby Steele, are quick to chastise the likes of Cornel West and other scholars of color as recipients of institutional tokenism:

[B]ut there is another “little gulag” for the black individual. He lives in a society that needs his race for the good it wants to do more than it needs his individual self . . . West’s achievements are simply not commensurate with his position as a University Professor . . . It was never Cornel West—the individual—that Harvard wanted; it was the defanged protest identity that he carried.¹¹⁰

Steele’s bone with Harvard’s commodification of West’s Blackness and stature raises the following question: *If* colorblindness is both an expedient and objective, should not the executors of this worldview closely abide by the principles they overzealously promote? Joseph Coors and Rupert Murdoch,¹¹¹ joined by a whose who of their ideological and socioeconomic ilk, are clearly not merely commodifying Connerly, but effectively pimping his Blackness for their own personal gain;

[T]he assault on racial justice is not, as Connerly would have it, the product of some groundswell of mass anger against equal opportunity measures in major institutions, but of political action by a small group of wealthy and powerful rights wing corporate tycoons who are trying to turn back the clock on civil rights . . . Some interesting names are on the list of contributors, including John Moores, Sr., University of California Board of Regents board member and owner of the San Diego Padres; Rupert Murdoch, head of the Fox News empire; Joseph Coors, the late Colorado beer baron . . . William J. Hume, head of the anti-labor San Francisco-based company Basic

109. See *Playing Race Cards*, *supra* note 56, at 8. (“A ready example was when George Bush nominated Clarence Thomas to the Supreme Court and with Thomas as his side, made a straight-faced declaration that race had absolutely nothing to do with his appointment.”).

110. *The Age of White Guilt*, *supra* note 104, at 40–41.

111. See *Highlights of Survey Results*, *supra* note 15, at 6, “Defining the initiative as a coordinated effort by wealthy outsiders significantly discredits the initiative . . . informing voters that the movement to get this initiative on the Michigan ballot was spearheaded by wealthy groups and individuals in California casts a long shadow of doubt. The secrecy surrounding who funds the efforts in Michigan and elsewhere also raises strong concerns.”).

American Foods; Kansas City businessman John Uhlmann; Harlan Crow; and Peter Schaeffer.¹¹²

Steele, Connerly and their ideological cohorts must surely be cognizant of this inconsistency, either justifying it as an ultimately worthwhile Machiavellian calculus toward implementing colorblindness, dismissing it as a rather inconsequential side-note, or particularly, as in the likely case of Connerly, laughing all the way to the bank. Moreover, the prevailing groupthink subsuming the colorblind camps has perhaps blurred their capacity for self-critique, which is evidenced in part by their practice of the very acts they condemn. Therefore, if Connerly thoroughly believed in the ideals he's been invested in for over a decade, he should call for a moratorium of race-conscious practices taking place within his own palace before storming into Michigan, and other states not his own.

The MCRI strategists and organizers routinely employed race-conscious political tactics during the campaign. Quite often, these tactics were carried out by fraud and deception, generally aimed at exploiting people of color. As discussed earlier, MCRI circulators looked to deceive people of color, specifically African Americans, into signing the misleadingly titled petition. Even the President of the Macomb County Chapter of the NAACP, Ruthie Stevenson, was a targeted victim and not beyond the bounds of exploitation:

I myself was approached to sign the petition, and the circulator told me it was for affirmative action and endorsed by Ruthie Stevenson. I gave him my card and told him, "I'm Ruthie Stevenson. Stop using my name to garner signatures."¹¹³

As was the case in both California and Washington, the strategy used to push the MCRI forward evidenced that racial exploitation was part and parcel of the colorblindness campaign. These race-conscious tactics employed on behalf of colorblindness are not unlike the affirmative action policies Connerly and his camp seek to destroy, distinguished only by virtue.

V. THE PERSUADABLE PARADOX

As a political enterprise, colorblindness has been extremely effective in mobilizing persuadables, i.e., undecided voters who sit squarely on the proverbial "racial justice divide." Contrarily, advocates of affirmative action simply have not been nearly as persuasive. Unequivocally, the competition

112. Lee Cokorinos, *The Big Money Behind Ward Connerly*, Equal Justice Society, May 26, 2005, available at http://www.equaljusticesociety.org/Cokorinos_Connerly_BigMoney.pdf.

113. *Report of the MCRC*, *supra* note 23, at 11.

over persuadable voters is itself not played on an equal playing field, skewed by the societal inequities and epistemological norms leveled in favor of the former. Yet, this observation should not serve as an excuse given that intersecting with this circumstance is the largely unimaginative and predictable strategies employed in recent campaigns. Those spearheading the fight to sustain affirmative action possess the most powerful hand, history and the rehabilitative spirit of the law, but have largely failed in manufacturing these baselines into effective and digestible messages. Colorblindness, antithetically, has brilliantly molded falsehoods about affirmative action into universally applicable and attractive rallying cries.

Ideologically backwards but logistically genius, the fluid manufacturing of colorblindness into political messages and media sound-bites derives primarily from its logical uniformity and its reliance on a generic and basic definition of equality. This brand of “equality” is devoid of historical or contemporary context or substance. Coupled with a legitimizing *Black face* via Connerly, colorblindness’ centerpiece rallying cries, “reverse discrimination,” “unqualified,” and “preferential treatment,”¹¹⁴ alone comprise a formidable popular vernacular that befell affirmative action in California and Washington State. Michigan too proved vulnerable to this formula, particularly the highly coveted *persuadable* White voters, which OUM ultimately failed to woo with its elaborate catering to (White) women and gender-based messages.

Michigan’s overwhelming White majority required the OUM campaign to commit much of their attention and resources to White women. Defeating the MCRI required not only wholesale mobilization of communities of color and other base voting blocks, but also a considerable percentage of White votes; particularly White women who historically have been among the primary beneficiaries of affirmative action—if not its principal benefactors. Unlike California, which was statistically a majority-minority state,¹¹⁵ OUM and its supporters lacked this demographical advantage in Michigan and thus, could not rely on simply activating known allies to secure victory. Bringing to life Derek Bell’s “interest convergence paradigm,”¹¹⁶ the campaign to sustain affirmative action

114. See generally Affirmative Action in Equalizing Opportunity, *supra* note 54.

115. California became a “minority majority state,” meaning its population of minorities exceeded that of its Caucasian residents, in 2000. Frank Pelligrini, *The Coming of the Majority Minority*, TIME MAGAZINE, Aug. 31, 2000, available at <http://www.time.com/time/search/printout/0,8816,53774,00.html>. “According to the U.S. Census Bureau’s latest tally, non-Hispanic Whites’ share of California’s population dropped to 49.9 percent some time last year. Over the past decade, their number has also declined, while immigration and good old-fashioned reproduction has boosted the number of Latinos by 35 percent in the past decade to 10.5 million and the Asian and Pacific Islander population by 36 percent to some 5 million. Blacks—who in California are a minority even among minorities—were nearly level at 2.2 million.”

116. “‘Interest convergence,’ or material determinism, adds a further dimension. Because racism advances the interests of both white elites (materially) and working-class

proceeded with another battle simultaneously taking place in Michigan: the campaign to persuade White voters that affirmative action benefited them just as much as it did people of color. Bell argues that the interest of Blacks [or other groups] in achieving racial equality will be accommodated only when it converges with the interests of Whites,¹¹⁷ which aptly assesses the lay of the land in Michigan regarding the MCRI and affirmative action. A prerequisite for victory was winning over White women. As a result, the campaign to defeat the MCRI was fought on two stages: first, winning the hearts and minds of persuadable Whites in Michigan's affluent suburbs, rural areas and homogenous towns (far from Detroit and other urban centers with considerable African American populations and other communities of color); and second, depending on its coalition members, principally the NAACP and the ACLU of Michigan, mobilizing and turning out communities of color and other base groups. This dichotomy fundamentally formed OUM's action plan, with much of its focus being devoted to the former.

In January 2006, OUM staged ten focus groups across the state to test and help shape its campaign messages, talking points and literature. The ten focus groups were extremely critical because they determined not only the crafting of campaign messaging, but also the prioritizing, framing and applicability of particular campaign messages. In other words, the focus groups determined which messages would be deployed with whom, and furthermore, which talking points, slogans and images resonated best with individual groups. Of the ten groups surveyed, eight were White and two African American, while six groups convened women and four men. More specifically, the focus groups included: four Caucasian male groups; four Caucasian female groups; one African American male group; and one African American female group.

Base communities were marginalized from OUM's focus group process, and therefore, were not treated as a high campaign priority. Latinos, Asian or Arab American groups were not surveyed at all, although each group comprises a considerable presence in Michigan. Lacking the objective data derived from focus grouping, the production of messages, talking points and media related to Latino, Asian and Arab Americans had to be done manually and unscientifically. Naturally, this approach was undesirable and inherently flawed, but the resources committed to Whites (particularly White women)¹¹⁸ was simply not there for base communities,

people (physically), large segments of society have little incentive to eradicate it." RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7 (New York University Press 2001) [hereinafter "Critical Race Theory"].

117. *Id.* at 18. "Civil rights advances for blacks always coincided with changing economic conditions and the self-interest of white elites. Sympathy, mercy, and evolving standards of social decency and conscience amounted to little, if anything."

118. Much of the public media advertisements, which rank as the most costly public education expenditures, were geared specifically to White women. See e.g., "New One

thus compromising the potential to fully integrate Latino, Asian and Arab American voters in the public education efforts. Grassroots efforts by coalition organizations, however, in part mitigated the damage caused through financial and research voids by actively incorporating their constituents, and establishing a regular and visible presence in their respective community centers and enclaves.

The focus groups were held in the three biggest media markets in Michigan: Detroit,¹¹⁹ Grand Rapids¹²⁰ and the Flint/Saginaw¹²¹ area.¹²² The Detroit sessions were the only set that surveyed people of color, African Americans,¹²³ with the remaining four in that market, and the combined four in Grand Rapids and Flint/Saginaw tailored to different White demographics.¹²⁴ Considering the stratified socioeconomic and educational levels of Whites in Michigan, OUM anticipated that differently situated Whites would respond differently to the set of questions and information presented in its probe,¹²⁵ including the most provoking queries, including:

United Michigan Radio Ad Focuses on Impact of Proposal 2 on Women," Press Release, Oct. 19, 2006, available at <http://www.oneunitedmichigan.org/mediaclips/Womenshealthriskradio.pdf>. "A new radio ad focusing on how Proposal 2 would hurt women and roll back progress toward achieving equality for women was released today by One United Michigan, the coalition opposed to Californian Ward Connerly's effort to end affirmative action in Michigan. 'Proposal 2's ban on state and local programs aimed at helping women should be a major concern to women,' said Debbie Dingell, One United Michigan steering committee co-chair. 'Proposal 2 will make it illegal for schools to establish events that encourage girls to explore careers in the fields of math and science, and will endanger access to life-saving health care services that apply only to women.'"

119. Held in the suburb of Southfield, on January 18th, 19th and 24th, at *Crimmins and Forman*, 29500 Southfield Road. "Affirmative Action Focus Groups: Client 730," One United Michigan Campaign Focus Group Schedule, Jan. 2006 [hereinafter "OUM Focus Group Schedule"].

120. *Id.* The two focus groups were conducted on Thursday, January 26, at *Advantage Research*, 6095 28th Street, S.E., #110, in Grand Rapids, Michigan.

121. *Id.* The two sessions were held on Wednesday, January 25, at the *Horizon Conference Center*, 6200 State Street, in Saginaw, Michigan.

122. *Id.* I attended and observed all of the focus group sessions, which lasted from two-and-a-half to three hours each and convened ten participants per session. Sitting in on the sessions provided me with a vivid illustration of lay sentiments on the ground in Michigan about questions regarding race, affirmative action, the economic climate, and other relevant social and political concerns.

123. *Id.* The two sessions held on Tuesday, January 24 tested African Americans. Group 1 was "African American women, Democrats or Independents, no conservatives;" Group 2 was "African American men, Democrats or Independents, no conservatives."

124. The focus groups hinged on the following factors: age, political affiliation, education level, socioeconomic status and nature of employment.

125. The probe was the twelve-page handout distributed to focus group participants, titled "Michigan Focus Group Guidelines."

What good (and bad) things have come about as a result of affirmative action?¹²⁶

When you think about jobs, what factors are involved in someone getting a job? Does everyone have an equal opportunity to attend college?¹²⁷

[Focus Group Participants were asked to read the MCRI Ballot Language and asked] What do you think this ballot initiative means? What is it trying to do?¹²⁸

It must be noted that there was relatively little consciousness or awareness of the MCRI in early January, therefore the vast majority of the participants had not encountered a comprehensive survey of affirmative action and the ballot initiative itself until their involvement in the focus groups. However, it was consensus among the White focus group sessions that the phrase “affirmative action” not be placed anywhere on OUM’s literature or media, given that its connotation was irrevocably negative, unsalvageable and thus counterproductive to OUM. This finding created a most troubling political paradox: namely, that the campaign to win over persuadables who be had without express mention of affirmative action in the media and messaging.

Again, the most pivotal persuadable group were White women, thus OUM committed four individual sessions to varying segments of this demographic. The first group in Detroit (hereinafter “Group 1”) was comprised of White, middle-aged women with children, and less than a four-year college degree.¹²⁹ Before directly engaging the probe’s questions, this patently liberal group was initially very averse to affirmative action, with nine of the ten participants indicating that they opposed it in principle.

The second group tested in Metro-Detroit (hereinafter “Group 2”) also surveyed women, but those whom were fifty years old or above and who did not attend college at all.¹³⁰ The first session in Grand Rapids also tested this demographic (hereinafter “Group 9”), and had strikingly similar results. Although formally less educated than the women in Group 1, Group 2 and 9 were relatively more nuanced and introspective in critiquing affirmative action, and other gender conscious programs. Several

126. *Id.* at 3 (Section IV, B, “I Want to Talk More About One of Those Phrases—Affirmative Action.”).

127. *Id.* (Section V, A, “Merit in Employment and College Admissions.”).

128. *Id.* at 5–6 (Section VI, “Introduction of Initiative.”).

129. See OUM Focus Group Schedule, *supra* note 120, at 1 (“Women, Caucasian, ages 30–50, have a child under 18 years in High School, less than 4 year college degree, Democrats or Independents.”).

130. See OUM Focus Group Schedule, *supra* note 120, at 1 (“Women, 50+, non-college. Mainly Democrats, Moderate or conservative.”).

participants in the latter two groups related affirmative action specifically to women and contextualized it within the struggle for women's rights and Title IX,¹³¹ with one relatively thoughtful participant observing that, "[I]t is not only about race, but also gender . . . It gives me an opportunity to compete with men, which we haven't always had in this country."¹³² Although the majority of the participants initially stated that they opposed affirmative action,¹³³ positions gradually changed as the collective engaged the probe's questions and exercises. The older women in Group 2 ultimately understood the MCRI as a measure that infringed upon the opportunities of both women and people of color, while many participants in Group 2 seemed uneasy with affirmative action in general; half were still not persuaded that it benefited, and still actively benefits, White women at all. One woman, whose staunch opposition to affirmative action was not even marginally altered by the presented information, closed by claiming, "[The amendment is] erasing barriers. They're [pushers of the MCRI] trying to make it that we're all equal. And that would be a good thing. It's never going to happen, but it would be a good thing."¹³⁴ The focus groups testified to the well-entrenched animus toward anything related to affirmative action, and in several instances, objective research illustrating its benefit to White women was dismissed.

The third session held in Metro-Detroit surveyed college-educated, White women (hereinafter "Group 3"),¹³⁵ as did the second Grand Rapids session (hereinafter "Group 10").¹³⁶ Relating their stories, this demographic was naturally more receptive to affirmative action because they recently experienced, and were able to witness, the instrumental role it played in their educational achievement and subsequent competitiveness in the job market. In addition, given that a majority of these women did not have children, they principally framed affirmative action in personal terms, assessing how it has impacted their own lives instead of its potential (or feared) influences on their children (as compared to a woman from Group 9 who commented, "[I] don't think it will help my daughter or

131. Title IX: Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2007). "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

132. Comment made by Focus Group participant in Group 2 (Southfield, Michigan, Jan. 18, 2006).

133. Six of ten, and seven of ten participants from Groups 2 and 9, respectively, indicated that they opposed affirmative action before engaging the probe questions and exercises (personal observation of author).

134. See *Educating Michigan Voters*, *supra* note 39, at 4.

135. See OUM Focus Group Schedule, *supra* note 120, at 1 ("Women, Caucasian, college-degree, 25-45").

136. *Id.* at 1.

son get into a good college, in fact I think it will hurt their chances.”)¹³⁷ Persuading White women, OUM’s most coveted voting demographic, would prove no easy task, which is why OUM dedicated much of its focus grouping resources to White women.¹³⁸

White men in Michigan were considered the most difficult of the persuadable groups. Nevertheless, OUM convened three sessions surveying White men: college-educated White men, with children in Metro-Detroit and Saginaw (hereinafter “Group 4” and “Group 8,” respectively),¹³⁹ and male, union members in Saginaw (hereinafter “Group 7”).¹⁴⁰ True to form, respondents from Groups 4 and 8 were overzealously opposed to affirmative action programs of any kind, particularly race-conscious strategies in the educational realm. The research concluded that White men subscribed wholesale to colorblindness, and believed that affirmative action undermined an equal playing field;

[A]s we have observed in the past, reaching out to white men on the issue of affirmative action is a challenging task. White men are less likely to see discrimination as a major problem in today’s world, and enter the discussion with a strong belief that banning affirmative action would help ‘level the playing field.’¹⁴¹

Buzz-words and phrases like “quotas,” “set-asides,” “reverse-discrimination,”¹⁴² “unfair,” and “not needed anymore,”¹⁴³ were routinely infused in the

137. Comment made by a Focus Group participant from Group 9 (Grand Rapids, Michigan, Jan. 26, 2006).

138. See OUM Focus Group Schedule, *supra* note 120, at 1.

139. OUM Focus Group Schedule, *supra* note 120, at 1 (“Men, Caucasian, 25–55, college graduate or more, with children under 18, Democrats or Independents.”).

140. *Id.* (“Men, union members, Democrats and Independents.” This group, although not formally set aside specifically for White participants, was all White. Not a single person of color participated in this session.)

141. Highlights of Survey Results, *supra* note 15, at 6.

142. See Critical Race Theory, *supra* note 117, at 79. [“M]any whites feel that these programs victimize them, that more qualified white candidates will be required to sacrifice their positions to less qualified minorities . . . So, is affirmative action a case of ‘reverse discrimination’ against whites?”

Harris discusses how the Supreme Court found that the Fourteenth Amendment Equal Protection Clause could be construed to safeguard the interests of Whites in competing for spaces at the University of California–Davis Medical School, but not as a measure to facilitate the admission of oppressed and discriminated against groups; “Bakke argued, and the Court agreed, that the majority admissions plan abridged Fourteenth Amendment guarantees for white, who although not historically oppressed, were nevertheless ‘persons’ within the meaning of the Equal Protection Clause . . . The University’s remedial choice did in fact interfere with the expectations of Bakke and other whites that they had a property interest in a space in the class. Expectations of privilege based on past and present wrongs, however, are illegitimate and are therefore not immune from interference.” WHITENESS AS PROPERTY, *supra* note 33, at 1772.

discussion and participants' commentary. In addition, the two groups framed affirmative action in largely black and white terms, casually overlooking the host of other groups it materially benefits, including White women. Participants also discussed how affirmative action hurts its purported beneficiaries, i.e., the stigma argument crafted by colorblind scholars. Prominently used by Connerly and his camp, the stigma argument's success is evidenced by its entrenchment into the vernacular of his following on the ground.¹⁴⁴ Without fail, at every presentation, debate or talk in which I was invited to speak or attended, an adversary of affirmative action was sure to introduce this argument into the discussion. Thus, it was anything but a surprise when several participants in Group 8 effectively articulated the contours of how affirmative action 'stigmatizes Blacks and Mexicans.' The findings derived from Group 8 revealed that not only would the OUM campaign have to deal with the juggernaut of entrenched racism in a hyper-segregated Michigan, but also the supplementary wave of colorblindness groupthink resonating with much of the state.¹⁴⁵ Demographically distinct from Groups 4 and 8, Group 7's blue collar, union respondents were naturally more concerned with Michigan's

143. One participant from Group 8 in Saginaw, Michigan commented that, "[W]e currently live in the age of enlightenment, were racism doesn't really exist anymore . . . so, affirmative action is really not needed, it's already run its course." This statement echoes the observation made by Steele: "To be black in my father's generation, when racism was rampant, was to be a man who was very often victimized by racism. To be black in the age of white guilt is to be a victim who is very rarely victimized by racism. Today in black life there is what might be called 'identity grievance'—a certainty of racial grievance that is entirely disconnected from actual grievance." See *The Age of White Guilt*, *supra* note 104, at 40.

144. The argument alleges that affirmative action brands its beneficiaries as unqualified, and thus, only admitted into a university or place of employment by means of their racial or ethnic appearance/affiliation. Moreover, the stigma is experienced both externally and internally by the subject. Externally, the subject is publicly identified as an unqualified "affirmative action beneficiary" who, unlike his/her peers, has not merited admission or hiring. Internally, the subject must existentially question whether he or she truly "deserved" admission or employment in a particular institution, and perpetually live with the psychological burden of revisiting this question throughout his/her career. See Kenneth Lloyd Billingsley, *Affirmative Action in Action: Dr. No*, FRONT PAGE MAGAZINE, Sept. 1, 1997, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=3425>. ("If you are a doctor or lawyer and admitted with a preference the first thing that goes wrong, we gravitate to 'was he qualified?'" says Ward Connerly. 'It's the problem of stigma. The opposition denies it but it is a real problem.'").

145. Much of this work was accomplished during the *Gratz* and *Grutter* cases, which were initially filed in 1997 and circulated through the courts for more than six years. The two cases brought the affirmative action debate to the fore in Michigan, and in turn, public opponents of affirmative action were mobilized by ubiquitous news and media coverage, perpetuating the urban legends of deserving, qualified White students like Jennifer Gratz and Barbara Grutter being rejected by the University of Michigan. The Supreme Court granted certiorari to the cases on December 2, 2002. See generally U.S. Supreme Court—April 2003 Cases, http://supreme.lp.findlaw.com/supreme_court/docket/2002/april.html (last visited Mar. 28, 2006). Plans of launching a state referendum against affirmative action formally initiated in 2004.

economic condition, and namely, their natural anxiety over not losing their jobs.¹⁴⁶ Many participants in Group 7 framed inequity almost exclusively in socioeconomic terms, seldom addressing its racial contours.¹⁴⁷ Amid a depressed, and rapidly spiraling, economic climate, union respondents feared that gender and race-based affirmative action programs threatened both their job security and upward mobility professionally, believing that “Corporate America” was their primary adversary.¹⁴⁸ Economic insecurity, however, was routinely framed in racially and particularly xenophobic terms. Participants openly discussed fear of corporations leaving the state and relocating abroad in search of cheap labor, and also corporations’ perceived hiring of immigrants to meet “affirmative action quotas.”¹⁴⁹

Continuing the xenophobic tenor of Group 8’s conversation, participants collectively agreed that Michigan’s economic tumult was brought about by the marriage of illegal immigration and corporations’ relocating internationally. The OUM brass forecasted that the union demographics would be relatively receptive, yet the focus groups *post facto* revealed another sociopolitical hurdle the campaign would have to overcome before November 7th: the robust climate of xenophobia fueled by economic uncertainty, specifically targeting Latinos and Asians in Michigan. The brand of nativism cultivated after 9/11 only exacerbated this rising tide of xenophobia, isolating the prominent Arab, Chaldean, Muslim and South Asian communities across the state.

The tension between framing affirmative action either in gender or race-based terms was virtually a constant when dealing with White persuadable voters. More specifically, OUM feared that introducing race-based messages framing affirmative action as chiefly remedial would alienate these voters. Therefore OUM adopted the *Grutter* and *Bakke* rationale, which generally embraced diversity but overlooked affirmative action’s rehabilitative mission, and categorically dismissed affirmative action’s corrective mission as viable campaign messages, and in doing so, alienated and angered African Americans, other communities of color, and sympathizers of these arguments in general.

146. A theme commonly reflected in the comments made by the group’s participants in Saginaw, Michigan, Jan. 25, 2006.

147. See Highlights of Survey Results, *supra* note 15 at 3. (“The union participants view the world as a set of inequalities—the ability to get a job or a good education is not on a level playing field. This is in part fueled by the economic conditions in Michigan today—the union participants are especially angry at ‘Corporate America’ and institutions in general.”).

148. See Educating Michigan Voters, *supra* note 39, at 2. (A participant from Group 8 testified that, “I think it is the rich people who are running the country . . . they’re in their own interest of making a lot of money and they don’t care about the common people in this country.”).

149. Highlights of Survey Results, *supra* note 15 at Working Class, White Men, Saginaw.

VI. NARROWLY TAILORING AFFIRMATIVE ACTION TO FIT THE INDIVIDUAL EXPERIENCES OF COMMUNITIES OF COLOR

African American communities in Michigan were not only victimized by the MCRI's exploitative tactics, but also by the relative neglect given to them by the OUM campaign. Greenberg Quinlan Rosner Research, the polling firm based out of Washington, D.C. which conducted OUM's focus groups, recommended:

[I]ncrease awareness among African Americans. This is a group that already understands the need to keep affirmative action programs without any initiative education, yet does not appear to be engaged in the debate. We need to energize this group by increasing awareness of the amendment. One fact that particularly upsets African Americans and creates anger is information about Ward Connerly and his previous efforts in other states.¹⁵⁰

Again, OUM committed only two focus group sessions to African Americans, both in Detroit, seemingly ignoring the fact that Grand Rapids, Flint, Saginaw, and other cities across the state, were home to considerable African American communities, all of which were targets for petition fraud.¹⁵¹ The two focus groups surveyed African American women (hereinafter "Group 5") and men (hereinafter "Group 6"),¹⁵² respectively, whom had less than a college degree, were middle-aged with children, and identified as Democrats or Independents. Unlike the remainder of the focus groups, which surveyed Whites, Groups 5 and 6 had positive reactions to the phrase "affirmative action."¹⁵³ Quite tellingly, comments made in both groups cited present-day racism,¹⁵⁴ particularly structural and institutional discrimination as well as lack of access,¹⁵⁵ and

150. Highlights of Survey Results, *supra* note 15, at 6.

151. See Report of the MCRC, *supra* note 23, (MCRC's public forums hearing testimony of MCRI petition fraud in these metropolitan areas).

152. See OUM Focus Group Schedule, *supra* note 120, at 1.

153. Educating Michigan Voters, *supra* note 39, at 6. ("Affirmative action is seen by African Americans as one of the few tools minorities have to combat discrimination and try to create a more level playing field. They believe that affirmative action programs 'correct' discrimination, opening doors that would be otherwise closed to minorities. African American participants believe that we will have a long way to go before a world exists where affirmative action programs are no longer necessary to level the playing field for minorities.").

154. See Educating Michigan Voters, *supra* note 39, at 6. (A participant from Group 6 commented that, "You still got profiling, you know, you got young black kids who need an extra push because they wanna go to college.").

155. *Id.* ("Well, affirmative action is a good thing . . . because in some cases it's the only way we can get our foot in the door to have an opportunity.").

Michigan's marked segregation¹⁵⁶ as the primary causes of inequality, more often than "past injustices."¹⁵⁷ Naturally, the poignancy of the observations and opinions made by respondents in Groups 5 and 6 were personally testimonial or experienced. Although the majority of the respondents were aware of affirmative action in general, and less so the *Gratz* and *Grutter* decisions, only one participant of the twenty (in total) had any awareness of the MCRI. This same gentleman was also able to identify Ward Connerly and link him to the MCRI, and the remaining respondents were scandalized upon the revelation that Connerly himself was an African American. Relative to their White counterparts, the African American women in Group 5 had a more developed consciousness related to gender-specific inequities. One participant instantly responded to the moderators query regarding the prevalence of discrimination along gender-lines, stating, "[C]ome on, it's out there. It's out there that females gotta work twice as hard to get even half the opportunities a male would get with just snapping their fingers."¹⁵⁸

The churches with large Latino and Spanish-speaking congregations also championed the "No on 2" message, and OUM, Metropolitan Organizing Strategy Enabling Strength ("MOSES"), La Sed and the ACLU of Michigan provided literature tailored specifically to this community. To maximize the public education effort, materials were made available in both English¹⁵⁹ and Spanish.¹⁶⁰ Juan Escoreno, a lead community organizer for MOSES, proved instrumental to the grassroots education work in Metro-Detroit's Latino communities. Escoreno, along with MOSES President Reverend Kevin Turman and Executive Director Ponsella Hardaway's vision, mobilized influential pastors and priests, as well as their churches, to actively promote the "No on 2" message.¹⁶¹ Given that places of worship are the center of both social and political life in communities color, the Catholic Church in the Latino Community proved an ideal

156. *Id.* at 7. ("[I]f it passes, we'll be even further behind. But at the same time, you know, I kind of already expect stuff like this being where we live at . . . it goes to what I was saying, we live in, we're the most segregated parts of the nation.").

157. *Id.* at 8. (One woman from Group 5 commented, "We've been held back so long, that in order for us to get in, they have to keep open avenues like that.").

158. Educating Michigan Voters, *supra* note 39, at 3.

159. *E.g.*, Khaled A. Beydoun and Juan Escoreno, "MCRI" HURTS LATINO-AMERICANS (2006), available at <http://www.aclumich.org/pdf/aclulatinohandout.pdf>.

160. *E.g.*, One United Michigan, QUE NO LO ENGAÑEN! (2006), available at http://www.aclumich.org/mcridocuments/educational_materials/handouts/Latino-Spanish.pdf.

161. MOSES held a statewide Public Rally, called "Prescription for Michigan: Repair the Tear!," attracting over 2,000 people, to Fellowship Chapel Church in Detroit on Sunday, October 22, 2006, at 4-5:30 pm. The public rally addressed the MCRI as its primary issue, and brought in Governor Jennifer Granholm, the Reverend Jesse Jackson and other notable speakers to speak in support of affirmative action. The MOSES website can be visited at <http://www.mosesmi.org>.

filter. In addition, Holy Redeemer Church, a Southwest Detroit church that serves as the center for community organizing and grassroots mobilization, was the functional nerve center for the pro-affirmative action efforts in the Southeastern Michigan Latino community.

Metropolitan Detroit also boasts the most concentrated Arab community outside of the Middle East. Dearborn, an enclave of Detroit, is the *de facto* capital of Arab America, home to thriving Lebanese,¹⁶² Palestinian,¹⁶³ Yemeni¹⁶⁴ and Iraqi¹⁶⁵ communities. In addition, Detroit has also been the destination for Chaldeans (Iraqi Catholics).¹⁶⁶ Many of these communities have established civic and cultural organizations, which were instrumental in filtering the “No on 2” message to their constituents. ACCESS, the Arab American Political Affairs Council (hereinafter “AAPAC”),¹⁶⁷ and the American Arab Anti-Discrimination Committee (hereinafter “ADC”)¹⁶⁸ serve the entire Arab American community. The Yemeni American Political Action Committee (hereinafter “YPAC”)¹⁶⁹

162. See generally GREGORY ORFALEA, *THE ARAB AMERICANS*, (Olive Branch Press 2006).

163. *Id.* at 201. (“There are large communities of Palestinian-Americans in Detroit”).

164. *Id.* at 198–199. (“Near the Detroit River and the Chrysler and Ford Motor Companies . . . is an entirely different group of recent immigrants to the United States: Yemenis . . . Their presence in the Detroit area, especially in the South-end of Dearborn, is the most concentrated of any Arab population in the United States.”).

165. The majority of these Iraqis are Shiite refugees who fled after the first American incursion into Iraq, and throughout the 1990’s, primarily as refugees. See Karen Rignall, *Building an Arab- American Community in Dearborn*, 5 *THE J. OF THE INT’L INST.* (1997), available at <http://www.umich.edu/~iinet/journal/vol5no1/rignall3.html>. (“Since the Gulf War the Detroit area has served as the point of entry into the U.S. for over 3,000 Iraqis a year. They are largely refugees from the violence and fraught politics of the region; many have spent the last five years moving from one camp to another, from Saudi Arabia to Jordan to the U.S.”)

166. See ORFALEA, *supra* note 163, at 191–192. (“[T]here are 150,000 Chaldeans in the United States, most in Detroit.”).

167. Arab American Political Action Committee, <http://www.aapac.org/organization.htm> (last visited Mar. 28, 2007). (AAPAC is based out of Dearborn, Michigan, and distributes annually an election slate card widely used by Arab Americans in Dearborn. Through a key partnership with AAPAC leaders Abed Hammoud and Osama Siblani, the ACLU of Michigan and OUM secured a “No on 2” endorsement from AAPAC, which ranked as one of the most critical developments in our grassroots efforts with Arab Americans in Michigan. AAPAC distributed voter slate cards in East Dearborn, Michigan’s heavily concentrated Arab American community where it is based, which is heavily relied upon by these voters, particularly only Arabic speaking voters. The slate card officially endorsed a Vote No on Proposal 2. See AAPAC, *AAPAC’s Slate – State of Michigan* (2006), <http://www.aapac.org/Newsletter%20Nov%2006/AAPAC-Nov%2006-P3Eng.pdf>).

168. ADC Michigan, <http://www.adcmichigan.org/> (last visited Mar.28, 2007) (ADC has a Michigan office based out of Dearborn, Michigan. Deputy Director, Rana Abbas, prioritized the MCRI as one of the organizations critical issues for the 2006 Michigan election.).

169. See ORFALEA, *supra* note 163 (YPAC is based in the South-end District of Dearborn and serves the political interests of Yemeni Americans.).

was active in mobilizing the Yemeni American community against the MCRI, and the Arab Chaldean Council¹⁷⁰ served as a key channel in educating Chaldean Americans. I served as OUM's point-person for the Arab American and Chaldean communities, producing the key materials, talking points and distributable literature.¹⁷¹ The primary educational flyers were sponsored by every prominent Arab American organization, and allocated at community events throughout the campaign. The materials were readily made available in both English and Arabic.¹⁷² As a result, Arab Americans, in large part, wholeheartedly adopted the "No on 2" message and in the process, were actively engaged in every segment of the campaign.¹⁷³ A week before the campaign, the prominent Arab American newspaper, forum and link, dedicated its entire issue to the MCRI, comprehensively covering it (in both English and Arabic) with several articles, educational advertisements, and a full-page cover spread.¹⁷⁴

Striving to bridge long-established ethnic divides in Michigan was indeed a precursor for solidifying a truly cohesive effort against Proposal 2. Given OUM's commitment to persuadable voters, grassroots organizing (such as discussed above) comprised the bulk of the education work done in communities of color. In the Asian American communities across Michigan, Wayne State Law School Dean Frank Wu was a prominent voice against the MCRI,¹⁷⁵ and OUM's Stephanie Chang served as the central catalyst for the on-the-ground effort.¹⁷⁶ Wrongfully branded as the "model

170. ACC, <http://www.arabacc.org/>, (last visited Mar. 28, 2007) (ACC is based in the center of the Chaldean American community, in Southfield, Michigan.).

171. I would be remiss if I did not mention Rashida Tlaib of ACCESS's key role in the development of these materials.

172. E.g., Khaled A. Beydoun and Rashida Tlaib, "MCRI" Hurts Arab Americans (2006), available at http://www.aclumich.org/mcri/documents/educational_materials/handouts/ArabAmericanHandout_English_and_Arabic.pdf.

173. See William Youmans, Ballot Initiative Attacks Arabs and Muslims, THE ARAB AMERICAN NEWS, Mar. 10, 2006, <http://www.arabamericannews.com/newsarticle.php?articleid=4635>.

174. FORUM & LINK, PROPOSAL 2 HURTS ARAB AMERICANS (2006), available at http://www.forumandlink.com/bins/site/content/past_issues_pdf/Vol_03_Issue_11.pdf?_resolutionfile=ftppath%7Cpast_issues_pdf/Vol_03_Issue_11.pdf.

175. See Ted Roelofs, *Asians Alerted to Affirmative Action Ballot Issue*, THE GRAND RAPIDS PRESS, July 28, 2006, <http://www.oneunitedmichigan.org/mediaclips/mlivejuly28.PDF> ("But Asian residents also have a stake in the proposed ban on affirmative action in Michigan, in the view of Wayne State University Law School Dean Frank Wu. 'The civil rights movement has produced tremendous benefits helping Asian Americans fight against bias . . . We all benefit from inclusion. Every study that looked at this has concluded that men and women, all of us, benefit from having this range of voices.'").

176. See ONE UNITED MICHIGAN, ASIAN PACIFIC ISLANDER MCRI HANDOUT (2006), http://www.aclumich.org/mcri/documents/educational_materials/handouts/APAbrochure.pdf.

minority” in the mythically binary affirmative action debate,¹⁷⁷ Asian American leadership proved vital in the campaign against Proposal 2.

VII. RESEGREGATION & ITS DISCONTENTS:
SURVEYING THE AFTERMATH OF THE ABOLITION
OF AFFIRMATIVE ACTION

*[E]vidence from California suggests that Proposition 209 eroded access to services, education, job training, and other opportunities . . . There is ample evidence to support expectations that passage of the MCRI in Michigan would result in a similar pattern of lost services and restricted opportunities.*¹⁷⁸

—Susan W. Kaufmann,
Assoc. Director of the University of Michigan
Center for the Education of Women

With the passage of Proposition 209 in California and I-209 in Washington State, many affirmative action and equal opportunity programs were categorically eliminated, materially-revised independently or by court order, or challenged in court but failed. The research and statistics documenting the ravaging impact of the preceding anti-affirmative action referenda provided Michigan voters with a breadth of evidence that ultimately indicted the MCRI. Exposing persuadable voters, particularly White Michiganders, to this research effectively chipped away at their reservations with affirmative action, particularly research illustrating setbacks to women in California and Washington:

[P]roviding factual information about how groups and individuals in California and Washington were impacted by similar initiatives gives credibility . . . about how Michigan will be impacted. Participants identified two statistics that bothered them the most: “At the University of California at Davis, the percentage of new faculty hires that were women dropped from 52% in 1994 to 13% in 1998 after the amendment was passed,” [and] “In Washington State, four years after the amendment passed, the share of Seattle public works contracts awarded to

177. See Critical Race Theory, *supra* note 117, at 81-82. (“The ‘model minority myth,’ according to which Asians are the perfect minority group—quiet, industrious, with intact families and high educational aspiration and achievement . . . It also causes resentment among other disfavored groups who find themselves blamed for not being as successful as Asians supposedly are.”).

178. SUSAN W. KAUFMANN & ANNE K. DAVIS, *THE GENDER IMPACT OF THE PROPOSED MICHIGAN CIVIL RIGHTS INITIATIVE* (2006), available at <http://www.cew.umich.edu/PDFs/MCRI.pdf>. [hereinafter GENDER IMPACT OF THE MCRI] .

minority or women-owned firms decreased by more than 25 percent.”¹⁷⁹

It is no surprise that the MCRI's primary targets are Michigan's prestigious colleges and universities, particularly the flagship Ann Arbor campus of the University of Michigan. The developments at the University of California's most selective campuses, UC-Berkeley and UCLA, foreshadow what is likely to take place in Ann Arbor, East Lansing,¹⁸⁰ and at other prestigious public colleges in Michigan. Opponents of affirmative action, notably Connerly, contend that although racial diversity declines immediately after the elimination of race-conscious admissions, numbers gradually return to their previous levels after institutions discover suitable proxies for race in administering their admissions schemes. This is nothing short of a lie, exemplified by shockingly low number of African American students admitted into UCLA's 2006 incoming undergraduate class. Only 96 of the 4,852 freshman enrolled at UCLA this year were African American, the lowest number in more than two decades; “[U]CLA—which boasts storied alumni as Jackie Robinson, Tom Bradley and Ralph Bunche . . . is in a county that is 9.8% African American . . . the 96 figure is the lowest incoming African American freshman since at least 1973.”¹⁸¹ Many of the incoming Black freshmen were recruited athletes or international students. Donnell White, among the NAACP-Detroit's most active leaders against the MCRI, reacted sharply to the “UCLA 96,” as that statistic came to be known on the ground in Michigan, “[B]lack are only welcome to UCLA to pitch, catch and fetch a football, and earn large sums of money for the university, but not for a publicly funded education. The same will happen at the University of Michigan and Michigan State University if we fail to stop the MCRI.”¹⁸² The virtual non-existence of underrepresented students of color at the University of California's flagship campuses, Berkeley¹⁸³ and UCLA, scared away admitted students of color, who chose to attend the state's private universities and colleges, out-of-state schools, and even less-selective

179. Educating Michigan Voters, *supra* note 39, at 8.

180. City of East Lansing, <http://www.cityofeastlansing.com/> (last visited Mar. 28, 2007) (The city of East Lansing is home to Michigan State University and adjacent to Lansing, the capital of the State of Michigan.).

181. Rebecca Trounson, *A Startling Statistic at UCLA*, THE L.A. TIMES, June 3, 2006, at A1.

182. Donnell White, Address at the Proposal 2 Townhall Meeting Titled “The Last Stand” held by Detroit Parent Network at Youthville in Detroit (Oct. 18, 2006). (White cited from the L.A. Times’ *A Startling Statistic at UCLA*, *id.*)

183. Simultaneous with the decreasing number of underrepresented minority enrollment at UC-Berkeley is the increase in the Asian American presence on campus. See Timothy Egen, *Little Asian on the Hill*, N.Y. TIMES, Jan. 7, 2007, at 4A. (“This fall and last, the number of Asian freshmen at Berkeley has been at a record high, about 46 percent. The overall undergraduate population is 41 percent Asian.”).

University of California campuses which boasted more diverse student bodies.

UC-Riverside, sometimes viewed as a dumping ground for students who can't get into other UC campuses, has become the university of choice for many Black and Latino students . . . While UCLA and UC Berkeley struggle to attract students from underrepresented minority groups, UC Riverside increasingly enjoys a reputation as one of the most ethnically diverse research universities in the nation.¹⁸⁴

Moreover, Proposition 209 formally created an affirmative action program for White men,¹⁸⁵ and eliminated outreach, scholarship and academic programs specifically tailored to students of color and women.¹⁸⁶ Ironically, neither the MCRI nor its precedents consider alumni relations or legacy admits as "preferential treatment" or a "handout," although these practices are inarguably *per se* examples.¹⁸⁷

In addition to abolishing affirmative action and ancillary programs, the MCRI will levy a chilling effect on even the investigation of patently legal strategies to increase create campus diversity. Intimidated by the possibility of being sued, universities are choosing to do away with much relied upon "diversity programs" And other outreach efforts to attract promising students of color. The MCRI promises to further stifle public endeavors to increase educational opportunity diversity through outreach, scholarships and recruitment efforts,¹⁸⁸ which will immediately intensify the already segregated educational landscape in Michigan. Even academic courses of study, like the UCLA School of Law's Critical Race Studies program, faced public challenges as serving as a functional affirmative

184. Richard C. Paddock, *Diversity Works at UC Riverside*, THE L.A. TIMES, Jan. 15, 2007, at A1.

185. See generally Paul Kivel, *Affirmative Action for White Men?*, IN MOTION MAGAZINE, Feb. 10, 2002, <http://www.inmotionmagazine.com/pkivel4.html>.

186. See Potential Impact of the MCRI, *supra* note 61, at 5. ("Pre-college outreach and preparation for low-income and minority students, including reading, math, science, SAT preparation, academic preparation and college outreach and information . . . Outreach for women and minority math, science and technology teachers . . . Scholarships, fellowships and grants at all levels of education that take into consideration race, gender, ethnicity or national origin.").

187. Race, Racism, and American Law, *supra* note 84, at 268-69. ("One wonders that, in the highly competitive college and graduate admissions process, so many barely hidden departures from the standards of fairness and merit are accepted, even defended, by so many whites for whom they pose unrecognized but very real barriers. And yet policies of racial preference, by an objective term perhaps the most justifiable departure of all, are bitterly opposed . . .").

188. See generally Potential Impact of the MCRI, *supra* note 61.

action proxy after the passage of 209,¹⁸⁹ which foreshadows similar challenges to similarly situated Michigan programs.¹⁹⁰

VIII. REVISITING RE-SEGREGATION IN AMERICA'S LAW SCHOOLS

The elimination of affirmative action at the law school is of particular concern, given the societal importance of the law and the role of the lawyer. Studying law at UCLA, where Proposition 209 in a short time transformed one of the most diverse law schools into one of the nations most homogenous, handicapped my legal education as well as my aggregate experience in Westwood. Transitioning from the University of Michigan—Ann Arbor, a campus widely recognized for its vibrant political activism and celebration of diversity, to UCLA was a striking cultural shift. As a member of UCLA Law's Students of Color Against the Re-segregation of Education (SCARE), I marched up and down Washington, D.C.'s capitol thoroughfares on April 1, 2003, the day the Supreme Court heard both *Gratz* and *Grutter*, and signed onto the amicus brief submitted to that Court by that same collective.

Although a prominent opponent of affirmative action, law professor Richard Sander aptly observes the stratified landscape of law schools and the legal profession, "[L]ike the legal profession itself, legal education is more stratified than most non-lawyers realize."¹⁹¹ Laura Gomez, Professor

189. See Daniel Golden, *Schools Find Ways to Achieve Diversity Without Key Tool: State Affirmative-Action Bans Bring Creative Solutions at UCLA*, Elsewhere, *THE WALL STREET JOURNAL*, June 20, 2003, available at http://online.wsj.com/public/resources/documents/Polk_Diversity_Without_Key_Tool.htm ("Erika Dowdell, a black Detroit native, didn't get into the University of Michigan Law School, which avowedly practices affirmative action. Yet she was admitted to the University of California at Los Angeles, another top-notch law school, which has been banned from considering race since a 1996 voter initiative prohibiting affirmative action in the state. One possible reason: Ms. Dowdell enjoyed an admissions preference at UCLA somewhat akin to affirmative action. On her application, she expressed interest in the law school's Critical Race Studies program, which examines the relationship between law and race. Applicants who plan to specialize in that field are held to a lower standard of grades and test scores. The Critical Race Studies boost is available to White applicants, too. But the subject is particularly popular among minority students. Established two years ago, it has helped the law school increase its enrollment of black first-year students to 13 in 2002 from five in 2000—out of a class of 305 each year. Black enrollment is still less than in 1996, the last year affirmative action was allowed in California.").

190. See, e.g., Wayne State's Center for Chicano Boricua Studies, <http://www.clas.wayne.edu/unit-event.asp?UnitID=42&Flag=All> (last visited Mar. 28, 2007); University of Michigan-Dearborn's Center for Arab American Studies, <http://casl.umd.umich.edu/caas/> (last visited Mar. 28, 2007) (Academic departments which focus exclusively on a particular ethnic or national experience, like the Chicano-Boricua Studies Program at Wayne State University, and University of Michigan-Dearborn's Arab American Studies Department, also face possible lawsuits.).

191. Richard H. Sander, *Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.*, 367, 369 (2004).

of Law who taught at the UCLA School of Law,¹⁹² wrote: "As someone who teaches criminal law to first year law students, I worry that we are ill-preparing a generation of lawyers to practice in multiracial California."¹⁹³ The homogeneity of the state's public law schools does not reflect California's rich diversity, thus, the state's prospective lawyers, prosecutors, judges and civic leaders are obtaining a limited, and limiting, legal education. Study of the law in California's public schools, without a diverse student body reflecting the state's many communities is qualitatively inferior to the education received by students at Stanford, the University of Southern California or the University of San Diego law schools, which are insulated from Proposition 209 and are thus permitted to continue their affirmative action policies. Gomez romantically recalls her criminal law courses before Proposal 209:

In fact, the first criminal-law class I taught, in 1994, looked like California. The conversations about crime and justice were intense. For example, because there was a critical mass of black students, they could disagree with each other and, in doing so, moved all students forward intellectually. I still hear from students in that class who say those experiences have benefited their legal practices.¹⁹⁴

The University of Michigan Law School, and other state law schools, will also lose out on the vibrant discussions and thorough legal educations made possible by student body diversity;¹⁹⁵ and more critically, the educational culture enriched by the indispensable experiences, testimonies and perspectives students of color bring with them to Ann Arbor. It is arguable that the absence of diversity has the most crippling effect on a legal education, given the character of the law and the social function of the lawyer, but what must not be overlooked is the materially compromised educations of those students of color who survive as one of few minorities in a post-affirmative action setting.¹⁹⁶

192. Professor Gomez is currently on the University of New Mexico School of Law faculty.

193. Laura E. Gomez, *Opinion, Loss of Diversity Means Lost Opportunity for Law Students*, THE L.A. TIMES, Sept. 24, 2000, at M3.

194. *Id.*

195. See generally Concerned Black Graduates Amicus, *supra* note 47, at 3. ("Nor are [affirmative action programs] tools for the diversification of academic environments," which are intended to benefit the institution and the student body, which is primarily White at most universities across the country, and in Michigan.)

196. See generally UCLA Students of Color Brief of Amicus Curiae in Support of Respondent in *Gutter v. Bollinger*, available at <http://chronicle.com/indepth/michigan/documents/briefs/respondent/UCLA.pdf>. (The brief is comprised of the personal narratives and testimonies of law students of color who studied at California's public law schools following the implementation of Proposition 209.)

Two years after the passage of Proposal 209 in California, William Bowen and Derek Bok's "Shape of the River"¹⁹⁷ study articulated many of the successes affirmative action programs have achieved since their inception. One illustrative study finds, "[B]lack graduates were more likely than white graduates to go on to become leaders of community, social-service, and professional organizations."¹⁹⁸ Therefore, the failure to enroll future lawyers of color has reverberating, long-term consequences on communities of color, which lose out on future leaders invested in the betterment of their communities. Michigan at large is currently being ravaged by a brain drain, with most of its promising young professionals heading out of state for better opportunity,¹⁹⁹ but the elimination of affirmative action effectively ignores the robust talent and potential within communities of color, choosing to not even cultivate their most promising future leaders.

CONCLUSION: RACING TOWARD THE END OF AFFIRMATIVE ACTION?

"I think the end is at hand for affirmative action as we know it."

—Ward Connerly,
only weeks after his victory in Michigan²⁰⁰

For Connerly and his supporters, the victory in Michigan symbolically and strategically signals the beginning of the end of the affirmative action era.²⁰¹ With the realignment of the U.S. Supreme Court toward the right, the future of affirmative action in America seems bleak. Despite an impassioned and organized coalition that ranked as Connerly's most formidable challenge thus far, the MCRI nevertheless passed by a wide margin. As a native of Michigan, raised in its streets and shaped by its public schools, it was extremely empowering to educate my community about the consequences of the MCRI, but exponentially more deflating when it finally sunk in that my home fell victim to Connerly. The surreal

197. William G. Bowen et al., *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, (Princeton University Press 1998).

198. Ben Gose, *A Sweeping New Defense of Affirmative Action Presidents of Harvard and Princeton Muster a Wealth of Data*, CHRON. HIGHER EDUC., Sept. 18, 1998, at A46.

199. See generally Brad Heath, *Exodus from Michigan Continues Economy: Joblessness Cited as Reasons Residents, Especially Younger Folks, Seek Greener Pastures*, THE DETROIT NEWS, Jan. 9, 2006, <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20060109/METRO/601090340/1003/rss>.

200. See *Affirmative Action Era is Over*, *supra* note 5, at 1.

201. *Id.* at 4, ("Connerly said that the overwhelming victory of Proposal 2 in Michigan at the same time that the state voted largely Democratic in other contests was a sign that anti-affirmative action measures could prevail anywhere in the country.").

setting that was Seldom Blues Restaurant, home to OUM's election-day party, on the evening of November 7, 2006 when the results came in was only matched by the jarring 16-point margin. As Michigan looks toward a re-segregated horizon, proponents of affirmative action and equal access must search for and develop new means to integrate marginalized segments of the state.

One thing is clear, Ward Connerly and his campaign for colorblindness will continue into other states. Every Michigan institution of notice, except the voters, opposed Proposal 2—the Democratic and Republican Parties, religious communities, the universities, unions, civil rights groups and even big business. Moreover, the days following Proposal 2's victory in Michigan proved promising given that opponents of the proposal steadfastly vowed to continue to work against its devices, and even challenge it in court.²⁰² Only one day after the MCRI's passage, University of Michigan President Mary Sue Coleman promised, in front of two-thousand students at the Ann Arbor campus, to continue to promote diversity in spite of Connerly's victory.²⁰³ Hours later, By Any Means Necessary ("BAMN") launched a second lawsuit against the MCRI, in conjunction with United for Equality and Affirmative Action and Rainbow/PUSH Coalition, claiming that it violates both the Equal Protection clause of the Fourteenth Amendment and the First Amendment, as established by *Grutter*.²⁰⁴ On December 19, a collective led by the ACLU of Michigan and the NAACP-Detroit Chapter filed suit seeking judicial interpretation of Proposal 2 in federal court,²⁰⁵ moving to compel the inclusion of race and sex as among the criterion to be considered in

202. See Affirmative Action Ban OK'd, *supra* note 7, at 1.

203. See Geoff Larcom, *Hundreds rally against Prop 2 University Won't Drop Commitments, Coleman Says*, THE ANN ARBOR NEWS, Nov. 9, 2006, http://www.oneunitedmichigan.org/postelectioncoverage/Ann_Arbor_Hundreds_rally_against_Prop_2.PDF ("Despite the 58 percent majority by which Proposal 2 passed, Coleman said she believes a broad coalition still exists that supports creating diversity on campus. That was shown by the many groups and individuals from the business, academic and government communities that supported U-M's efforts, Coleman said in a meeting with the media prior to the Diag speech.")

204. *Grutter*, 539 U.S. 306.

205. See ACLU, NAACP Announce Lawsuit Seeking Interpretation of Proposal 2 to Allow University Admissions Programs to Continue, ACLU PRESS RELEASE, Dec. 19, 2006, <http://www.aclumich.org/modules.php?name=News&file=article&sid=515>, ("Filing a lawsuit today on behalf of 19 students, faculty and applicants to the University of Michigan, a coalition of civil rights groups including the American Civil Liberties Union of Michigan, NAACP—Detroit Chapter, NAACP, Michigan Conference, and NAACP Legal Defense and Education Fund, are asking a federal court to declare that Proposal 2 has not changed the Supreme Court's view, stated as recently as 2003, that it is constitutionally permissible for universities to consider race and gender as one factor among many in university admissions.")

university admissions.²⁰⁶ Defiantly, proponents of affirmative action in Michigan are investigating, and exhausting, every possible means to curb the implementation of the MCRI.

The MCRI won handily in the court of public opinion, now it is left to the courts to determine what it can effectively nullify. One thing that will surely not be nullified is the spirit so colorfully demonstrated by the leaders and activists that came together in defense of affirmative action, a collective that embodied the harmonious diversity that can, perhaps one day, be had in Michigan.²⁰⁷

206. See ACLU of Michigan, *ACLU, NAACP Announce Lawsuit Seeking Interpretation of Proposal 2*, Dec. 19, 2006, <http://www.aclumich.org/modules.php?name=News&file=article&sid=515A>. (Coalition of civil rights groups including the American Civil Liberties Union of Michigan, NAACP—Detroit Chapter, NAACP—Michigan Conference, and NAACP Legal Defense and Education Fund, are asking a federal court to declare that Proposal 2 allows for race and gender to be considered as one factor among many in university admissions as consistent with the Supreme Court's 2003 ruling in *Grutter v. Bollinger*.) See also Chastity Pratt & Dawson Bell, *Rights Groups File Prop 2 Lawsuit*, THE DETROIT FREE PRESS, Dec. 20, 2006, <http://www.oneunitedmichigan.org/mediaclips/FreepProp2.pdf>.

207. E.g., *Overturing 209: A Joint Symposium and Movement*, <http://overturing209.boalt.org/index.htm> (last visited Mar. 28, 2007). (The "Overturing 209 Movement" was officially launched in April, 2006, at the University of California-Berkeley, with a Symposium titled, "Overturing 209: A Joint Symposium and Movement.")